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NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

THE JUSTICE OF PREVENTIVE WAR

by

Henry Alan Stephenson

September 2004

Thesis Advisor:
Second Reader:

Daniel J. Moran
Steven Ashby

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REPORT DOCUMENTATION PAGE			<i>Form Approved OMB No. 0704-0188</i>	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE September 2004	3. REPORT TYPE AND DATES COVERED Master's Thesis	
4. TITLE AND SUBTITLE: The Justice of Preventive War			5. FUNDING NUMBERS	
6. AUTHOR(S) Henry Alan Stephenson				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING /MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.				
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release; distribution is unlimited			12b. DISTRIBUTION CODE	
13. ABSTRACT (maximum 200 words) <p>In response to the 9/11 attacks and continuing threats of mass-casualty terrorism, the United States has adopted a new security strategy that emphasizes anticipatory actions including preventive war. Prevention, undertaken in the absence of an act of aggression or an imminent threat, is prohibited by modern conceptions of just of war and international law. Many critics of the strategy fear that any legitimization of preventive war would endanger international stability. But an examination of the relevant ethical issues from the perspective of just war doctrine reveals contradictions within a blanket prohibition of preventive war. Preventive "strategic interventions" against illiberal regimes—states that correlate with the threats of terrorism and weapons of mass destruction—parallel humanitarian interventions in that they have an ethical basis in the relationship between human rights and the right of state sovereignty. A widely-accepted minimum standard of human rights, incorporated into new international institutions and/or an explicit revision of the definition of just war, could serve as an ethical boundary for both preventive wars and humanitarian interventions. The formal qualification of prevention and its merger with humanitarian goals could bring enhanced international legitimacy and support to preventive actions by the United States and its allies.</p>				
14. SUBJECT TERMS Just war, jus ad bellum, preemptive war, preemption, preventive war, prevention, war on terrorism, national security strategy, strategic intervention, humanitarian intervention, human rights			15. NUMBER OF PAGES 87	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UL	

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THE JUSTICE OF PREVENTIVE WAR

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF ARTS IN NATIONAL SECURITY AFFAIRS

from the

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ABSTRACT

In response to the 9/11 attacks and continuing threats of mass-casualty terrorism, the United States has adopted a new security strategy that emphasizes anticipatory actions including preventive war. Prevention, undertaken in the absence of an act of aggression or an imminent threat, is prohibited by modern conceptions of just war and international law. Many critics of the strategy fear that any legitimization of preventive war would endanger international stability. But an examination of the relevant ethical issues from the perspective of just war doctrine reveals contradictions within a blanket prohibition of preventive war. Preventive “strategic interventions” against illiberal regimes—states that correlate with the threats of terrorism and weapons of mass destruction—parallel humanitarian interventions in that they have an ethical basis in the relationship between human rights and the right of state sovereignty. A widely-accepted minimum standard of human rights, incorporated into new international institutions and/or an explicit revision of the definition of just war, could serve as an ethical boundary for both preventive wars and humanitarian interventions. The formal qualification of prevention and its merger with humanitarian goals could bring enhanced international legitimacy and support to preventive actions by the United States and its allies.

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ACKNOWLEDGEMENTS

In addition to my thesis advisor, Dr. Daniel Moran, and second reader, CAPT Stephen Ashby, I would like to thank the following Naval Postgraduate School faculty members for their assistance with this thesis: Dr. Edwin Micewski, visiting from the National Defense Academy in Vienna; Dr. Anne Clunan; Dr. Anne Baylouny; and Dr. David Yost. Thanks also to the fine staff at the Dudley Knox Library.

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I. INTRODUCTION

A. A NEW U.S. STRATEGY

Since the end of the Cold War, terrorism and the proliferation of weapons of mass destruction have come to be regarded as the primary threats to the security of the United States and its allies. The current US administration has responded to the attacks of 11 September 2001 and the danger of even greater potential threats by highlighting the option of “preemption” as a part of the US National Security Strategy published in 2002. Preemption, while not explicitly allowed by the UN Charter, has long been recognized as a legitimate rationale for war, but only under the relatively narrow conditions of an imminent threat, the absence of alternatives to preemptive attack, and the proportionality of the attack to the anticipated threat. However, in today’s threat environment, characterized by non-state actors with shadowy relationships to states and potential access to weapons of mass destruction, the viability of those criteria as a basis for war is increasingly questionable.

In fact, the National Security Strategy is an expression of growing concern that a state cannot adequately protect itself from sustaining a potentially debilitating attack while faithfully honoring these criteria. Technological advancement and globalization are rapidly decreasing the distance between the will to inflict great harm and the practical ability to do so. In an age when ounces of toxins can kill thousands and 200-ton aircraft moving at half the speed of sound crisscross the sky, capabilities to kill on a large scale are, for the purposes of strategic planning, ubiquitous—and accessible by entities other than states. Recognizing this, the US National Security strategy argues that it is impossible for US policy to be limited to preemption in strict accordance with the conditions of imminent threat and last resort, as these have been understood in the past.

Thus, the real aspiration of the new US strategy, exemplified by the invasion of Iraq, is to assert a right to wage what would be better described as preventive war, that is, war aimed not against a clearly identifiable existing threat, but aimed to prevent the very formation of such a threat. By this logic, the United States and willing allies would be prepared to use force to shape international conditions so that threats do not develop. The

US invasion of Iraq was frequently described as “preemptive” because international custom extends some legitimacy to preemption and “that is the language currently in vogue;” but “recognizing that prevention is at issue here—not preemption—is key.”¹

The immediate problem is that preventive wars are unjust according to current conceptions of the justice of war and their manifestations in international law. Regardless of the actual utility of preventive war to protect against attack by terrorists or states armed with WMD, many concerned observers make the reasonable argument that a doctrine of preventive war is a prescription for endless conflict: Once the just war criteria of just cause and last resort have been modified and rejected, respectively, in order to allow preventive war, there appears to be no clearly identifiable standard by which any act of anticipatory self-defense could be condemned. After all, every state is a potential threat to every other to some extent. If preventive war were legalized without qualification, the world would be awash with pretexts for wars of conquest and aggression. The impending dilemma, then, is that the good that could come from preventive wars aimed at terrorists and associated rogue states could easily be outweighed by the harm inflicted on international order by legalizing such wars.

B. THE IMPORTANCE OF THE JUSTICE OF WAR

The ethical basis of US strategy in the war on terrorism is important for two reasons. First, it distinguishes us from our enemies. Our primary objection to terrorism is an ethical one: While we may regard specific terrorist groups as enemies because they attack us or because they happen to have interests inimical to ours, we regard terrorism in general as a threat to international order and justice because of the moral calculus that terrorists use to justify their attacks. We define terrorism as a specific kind of violation of our ideas on the just use of violence, which we believe—and international law asserts—to have some absolute, universal applicability. Ethics is not only the means by which we define our enemy in the war on terrorism, but the means by which we remain distinct from our enemy. In a conflict that many believe to be one of civilization against barbarism, practical questions are inseparable from ethical ones. Against all enemies

¹ Lawrence Freedman, “Prevention, Not Preemption,” *The Washington Quarterly* 26, no. 2 (Spring 2003).

who employ violence indiscriminately, but against terrorism especially, we face the perennial questions of “How do we defeat such ruthlessness? And can we defeat it without becoming ruthless ourselves?”²

Second, our perception of the justice of our own use of force influences our ability to use it. “Even the most powerful states wish others to view their actions as legitimate. They need allies when undertaking military action and supporters to provide policing assistance, civilian infrastructure, and financial support in the aftermath of war.”³ The just war tradition provides a framework upon which we can evaluate the morality of our use of force; it has “become part of the way in which much of the world [speaks] of war and peace questions.”⁴ If the just war discourse renders an unfavorable verdict upon US policies, the efficacy of those policies is undermined. This has led Michael Walzer to suggest, with some satisfaction, that “justice has become a military necessity.”⁵

The importance of ethics in our use of force compels us to examine the conflict between our inherited understanding of just war and our new security strategy. Is the preventive component of the US security strategy immoral? Or is a reconsideration of the moral boundaries of war in order? Such reconsideration would not be the first. Regarding the evolution of the just war tradition between medieval and modern times, scholar James Turner Johnson explained that “the various theories of just war produced in the former era presupposed certain features of war that were no longer present in the modern age... New developments in the theory and practice of war implied adjustment in the mechanism of restraint.”⁶ No one could deny that modern terrorism and the availability of WMD to rogue states presents new “features” to warfare. As a result, the “just war tradition at the opening of the twenty-first century shows some signs of having

² Lee Harris, *Civilization and Its Enemies* (New York: Free Press, 2004), 19.

³ Allen Buchanan and Robert E. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” *Ethics and International Affairs* 18, no. 1 (2004): 21.

⁴ Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), 53.

⁵ Michael Walzer, *Arguing about War* (New Haven, CT: Yale University Press, 2004), 9.

⁶ James Turner Johnson, *Just War Tradition of the Restraint of War* (Princeton: University Press, 1981), 172.

reached the limit of its elasticity, as it were.”⁷ To refuse to adapt just war doctrine to current realities would be merely to keep it bound to old ones.

But the intimate connection between the exigencies of security and the content of just war doctrine does not mean that the latter is merely a source of “rationalizations or public justifications for decisions made on other grounds.”⁸ This cynicism has an extensive history, as evidenced by Immanuel Kant’s complete expression of it more than two hundred years ago:

Given the depravity of human nature, which is revealed and can be glimpsed in the free relations among nations, one must wonder why the word “right” has not been completely discarded from the politics of war as pedantic, or why no nation has ventured to declare that it should be. For while Hugo Grotius, Pufendorf, Vattel, and others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force are always piously cited in justification of a war of aggression, no example can be given of a nation having foregone its intention [of going to war] based on the arguments provided by such important men.⁹

Yet, Kant acknowledged immediately afterward that the concept of a “right” to war is meaningful to some extent:

The homage that every nation pays (at least in words) to the concept of right proves, nonetheless, that there is in man a still greater, though persistently dormant, moral aptitude to master the evil in himself (a principle he cannot deny) and to hope that others will also overcome it. For otherwise the word “right” would never leave the mouths of those nations that want to make war on one another...¹⁰

Walzer voices the same idea in the first pages of his seminal *Just and Unjust Wars* by observing that the very existence of moral language and the mechanism of moral reasoning are to some extent “coercive,”¹¹ even if they are often overpowered by strategic calculations. Thus Hedley Bull’s judgment that “a state that cites a just cause,

⁷ Nicholas Rengger, “On the Just War Tradition in the Twenty-First Century,” *International Affairs* 78, no. 2 (2002): 353.

⁸ Richard K. Betts, “Striking First: A History of Thankfully Lost Opportunities,” *Ethics and International Affairs* 17, no. 1 (2003): 17.

⁹ Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch” (1795) in *Perpetual Peace and Other Essays*, Ted Humphrey, trans. (Indianapolis: Hackett, 1983), 116. (Kant’s extensive parenthetical insertions were omitted for the sake of clarity.)

¹⁰ Ibid.

¹¹ Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 1999), 12.

even if it doesn't believe in it, is better than a state that ignores the idea of just cause altogether."¹² The citation of just war concepts acknowledges that violence should be subject to ethics, providing an opening for appeals for restraint. And the impact of these appeals is evident in the actual conduct of states at war: For example, the fact that the United States and its allies have used force in measured, restrained ways in Afghanistan and Iraq, even at great danger to their own personnel, indicates that influences other than naked self-interest are at work.¹³

C. MAJOR QUESTIONS AND ARGUMENTS

This thesis challenges the verdict of many contemporary ethicists that preventive wars are necessarily unjust. It asks the following questions: By what reasoning does just war doctrine prohibit preventive war? What is the quality of that reasoning, and does it remain valid in the face of recent changes in the character of international security threats? Under what circumstances could a preventive war be just? Does the global consensus on the importance of basic human rights offer a standard against which the justice of a preventive war—often aimed at regime change—may be measured? What might be the consequences of the qualified legalization of preventive war on the international system?

The thesis proposes that the increasing severity of the threat from terrorism and WMD must drive a change in just war doctrine to allow preventive war under certain circumstances. The thesis examines the viability of human rights as a standard for the justice of preventive war and considers, largely on the basis of just war doctrine itself, whether wars of prevention may be just if they are waged against the governments of illiberal states. This condition would limit the scope of a preventive war doctrine, empowering it to confront current threats without throwing the international system into disarray. It would also be consistent with the growing international agreement on the universality of basic human rights. In fact, this thesis will argue that the ethical problems of prevention and the ethical problems of humanitarian intervention are merely different

¹² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), 45.

¹³ See Elshtain.

sides of the same philosophical issue: the ethics of unqualified state sovereignty, which underlies the current international order. The new realities of security threats and the timeless realities of injustice behind state borders are both call for the violation of the sovereignty of certain states. It is important that our conception of just war remains in touch with those realities, thereby empowering that ethical system to provide useful guidelines to national leaders and international institutions. Specifically, the facts suggest that allowing preventive wars against illiberal regimes might do more to advance the goals of modern just war doctrine than continuing to prohibit them unquestioningly.

Of course, the idea of reincorporating a judgment on the moral status of adversaries into just war theory is a challenge to the entire basis of the international system and invites attack on obvious philosophical and historical grounds. Such judgments were at the heart of the Europe's internal holy wars that culminated in the Thirty Years War, and Hugo Grotius' *De Jure Belli ac Pacis* (On the Law of War and Peace, 1625), one of the founding documents of international law, was largely an effort to save Europe from the carnage that such religious conflicts could produce. The denial of religious differences as a just cause for war is reasonably seen as a major achievement of Western Civilization. But the West may have overreached by negating all *moral* differences as a just cause for war: After all, the doctrine of just war advanced by Grotius and other modern theorists is derived from natural law and individual rights, resulting in an ethical contradiction within the prohibition of wars against regimes that fail to honor those rights. This contradiction is not new, and in various forms it has been a perennial feature in the literature on the use of force in the international arena. But after 9/11, there is a new urgency to resolve it.

D. OVERVIEW

The next chapter begins this process by analyzing the relationship between the ethical criteria for the justice of war (*jus ad bellum*) and the security strategy of prevention. This analysis begins with an itemization of traditional *jus ad bellum* criteria (just cause, right intention, proper authority, open declaration, last resort, proportionality, and chance of success) and an examination of the general security strategies of self-

defense, preemption, and prevention. The chapter then overlays prevention with the just war criteria, finding that last resort is the only criterion that prevention necessarily fails and that there is an inherent contradiction between the juridical criterion of last resort and the prudential criterion of proportionality in the case of a soundly reasoned preventive war. In this context, the chapter critiques the validity of the last resort criterion. Next, the chapter examines the objections to preventive war, most of which are based on a practical concern with preserving an international order that has developed primarily to control interstate conflict in the realist paradigm.

Chapter III examines the value of that current international order in providing security from new threats. It begins with a look at the ways that the legalization of preventive war could threaten the current order. The chapter then analyzes how successfully that order, which is optimized to confront the types of threats that arise from a realist conception of international relations, addresses new threats of terrorism and WMD. To that end, the chapter identifies the key differences between traditional interstate threats and new ones, including the inversion of the role of power, the ethics and motivations of non-state groups, and the relevance of the internal characteristics of states. Expounding on this last factor, the chapter explores how the illiberal nature of some states contributes to the severity of the threat from terrorism and WMD. The chapter concludes that the current international order is of limited utility in confronting the threats of mass-casualty terrorism and WMD, and that preventive war might have a new practical utility and ethical basis in the current environment. That ethical basis is made available by the fact that preventive wars against terrorism would be directed against illiberal regimes.

Chapter IV investigates the possibility of human rights serving as a standard that could be used to place an ethical and legal boundary on preventive war. The chapter begins by pointing out that the institutions that form the current international system, including sovereign states and the United Nations, have a basis in individual rights. It then briefly examines the feasibility of a universal standard of rights, without entering the vast subject of what that precise standard might be. Next, the chapter surveys the ethical issues surrounding wars of humanitarian intervention, with a focus on the work of Michael Walzer, and compares the suppression of human rights within state boundaries

to aggression across state boundaries, suggesting that both are violations of individual rights. It follows that a government that suppresses basic human rights is already engaged in a mode of violence that is morally indistinguishable from the “aggression” that just war doctrine and international law identify as a just cause for war. The chapter concludes by exploring the parallels between the ethical dimensions of humanitarian interventions and preventive wars, both of which cast the goods to be achieved by war against the international norm of inviolable state sovereignty; both questions, then, can be construed as searches for a formal criterion other than self-defense by which war can be justified.

Chapter V concludes the thesis by putting the debate over preventive war into the context of the timeless contradiction within the international order between 1) the advancement of human rights that stems from the general peace and stability of an international system based on inviolable state sovereignty and 2) the abuse of human rights that occurs because the sovereignty of certain states is inviolable. The thesis considers two proposals for legitimizing prevention in a controlled fashion in the international system, both of which link the justification of prevention to human rights in different ways. The first, offered by Allen Buchanan and Robert E. Keohane in the 2004 issue of *Ethics and International Affairs*, is a “cosmopolitan institutional” approach: It legally bounds preventive war by placing it under the authority of an international institution that creates disincentives for states to launch preventive wars that do not prove justified on human rights grounds. The second approach, offered by this author, ethically bounds preventive war by modifying the *jus ad bellum* to admit war against a regime that fails to meet certain human rights standards. This formal criterion, when combined with the practical utility of fighting such a war, would provide a basis upon which states could determine the ethics of preventive war.

II. JUST WAR DOCTRINE AND PREVENTIVE WAR

A. *JUS AD BELLUM* CRITERIA

Just war doctrine does not codify the justice of war. Rather, it provides a useful framework of terminology, principles, and standards upon which to consider the ethical aspects of questions of war and peace. The just war tradition has classical origins but was developed by Christian scholars through the late medieval period. Afterward, the West's idea of just war was carried forward mainly by secular jurists who began to establish formal international law. Just war doctrine is reflected in modern international law and institutions, but it remains an ethical—not a legal—system. Nonetheless, it plays a legal role by continuing to generate ideas on what international law on war and peace *should* be. That is the purpose for which just war doctrine will be employed here: to provide insights on what the law should be regarding preventive war.

The just war tradition addresses two related but distinct issues regarding war. The first issue is the justice of war, *jus ad bellum*, which concerns the reasons and justifications of states for going to war. The second issue is justice in war, *jus in bello*, which concerns the means by which states conduct war. The question of whether preventive war can be just lies within the purview of *jus ad bellum*, and this paper will largely remain with that branch of just war doctrine. Over the centuries, the question of *jus ad bellum* has come to be framed in terms of a list of criteria by which the justice of a war may be evaluated. These criteria have evolved over time, but the following list concisely reflects the most modern conception of the just war.

The first criterion is the most basic: just cause. Self-defense is now regarded as the quintessential just cause, and the UN Charter codifies self-defense against acts of external aggression as the only reason for which a state may legitimately use force without UN Security Council approval. However, as James Turner Johnson notes, the equivalence of just cause with self-defense against ongoing aggression is a relatively new idea; at various times the just war tradition has seen justice in causes of “defense of the

innocent,” “recovery of something wrongly taken,” and “punishment of evil” also.¹⁴ Indeed, international law appears to be rediscovering just causes beyond self-defense; the tension between the UN Charter and armed humanitarian interventions performed under UN authority is a “pale echo of the old emphasis on protection of the innocent.”¹⁵

Related to just cause is the criterion of right intention. This requires a state to intend by war only to rectify the causal injustice that makes war necessary, and not to use the opportunity of just cause to advance other interests or satiate wicked impulses. Though lesser known, right intention is one of the three oldest just war criteria: It was identified by St. Augustine, who was concerned about how a Christian could remain virtuous while engaged in violence. Right intention was Augustine’s demand that war be conducted in accordance with the Christian imperative to “love thy enemy.”

The decision to go to war may only be made by a proper authority. Early in the just war tradition, proper authority could reside in either clerical or princely officials, but since the emergence of the Westphalian system in 1648 the authority to wage war has been left to the sovereign authorities of states. The war must also be declared openly, so that an adversary has the opportunity to provide satisfaction of grievances without the need to resort to violence. This gives way to the criterion that a war must be the last resort available to a state to achieve justice, allowable only after all other reasonable measures have been honestly considered.

These first five criteria—just cause, right intention, proper authority, open declaration, and last resort—have a deontological basis; they speak to whether a state has a right to fight a war. With the notable exception of right intention, they lend themselves to legal codification because they are objectively demonstrable—in theory, at least—in the same sense as evidence in a court case. They can therefore be referred to as *formal* or *juridical* criteria. As such, they relate to the procedures by which states may pursue claims against one another. International law has at times shied away from codifying even this aspect of the *jus ad bellum*, but the potential legal utility of these formal criteria

¹⁴ James Turner Johnson, “Threats, Values, and Defense: Does the Defense of Values by Force Remain a Moral Possibility?” in *Just War Theory*, Jean Bethke Elshtain, ed. (New York: New York University Press, 1992), 57-59.

¹⁵ Rengger, 359.

is central in understanding both the ethical difficulties of preventive war and the solutions that this thesis examines.

Formal criteria are not the whole of the *jus ad bellum*, however. While they outline a state's right to launch a war, they do not speak to whether a state should exercise that right—and the just war tradition has always been interested in the latter question. Theorists on the ethics of war and peace since classical times have been concerned not only with the standing of a ruler to launch a war, but also with the wisdom of doing so, taking into the account the costs and benefits that the war was likely to bring to people on both sides of the conflict. In *De Jure Belli*, Grotius acknowledges this distinction and argues that a war, though it may be “just,” should often be declined nonetheless on practical grounds. He quotes Plutarch: “After the college of heralds had pronounced a war to be just... the Senate further deliberated whether it was expedient to undertake it.”¹⁶ Grotius writes that such a decision should be made on the basis of “the proportion which the means and the end bear to each other.”¹⁷ Accordingly, Grotius argues that there are certain injustices that are tolerable if war is the only alternative: These may be minor injustices for which recourse to war is not worthwhile or for relatively major injustices—even enslavement—if recourse to war is futile and would only result in death.¹⁸

These are expressions of the *prudential* just war criteria of proportionality and chance of success. As opposed to the deontological criteria, these criteria are teleological and thereby introduce a utilitarian element to just war thinking. They are also inherently subjective, because they compel leaders to make value judgments and forecast the costs and gains of different courses of action. They are therefore highly resistant to legal codification, so much so that Grotius felt obligated to apologize for examining them in a treatise that purported only to address formal, legal aspects of war. But since then, just war doctrine has integrated the concepts of proportionality and

¹⁶ Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace), A.C. Campbell, trans. (Kitchener, Ontario: Batoche Books, 2001), Bk. II, Chap. 24, IV.

¹⁷ Ibid., V.

¹⁸ Ibid., VI, and Chap. 25.

chance of success as *jus ad bellum* criteria in their own right. They hold that it is unethical to use violence in pursuit of ends that do not compare favorably with the rights that war inevitably violates.

B. SELF-DEFENSE, PREEMPTION, AND PREVENTION

Apart from the ethical concerns of just war criteria are a set of categories rooted in the realist nature of the international system that describe the strategic—not moral—calculations used by states to make decisions to go to war. The categories of self-defense, preemption, and prevention constitute a spectrum of security strategies ranging from purely reactive to purely active. Self-defense is simply when a state reacts to an aggressor that is engaged in an attack.

Preemption is typically seen as a sub-category of self-defense in which a state reacts to a clearly identifiable and imminent threat by initiating hostilities to thwart the threat or minimize its detrimental effect. Predictably, preemption has been a more contentious issue for international law than the act of pure self-defense. The potential justice of preemptive war has been recognized in the just war tradition since the time of St. Augustine,¹⁹ and “under the regime of customary international law that developed long before the UN Charter was adopted, it was generally accepted that preemptive force was permissible in self-defense.”²⁰ The criteria under which preemption was permissible were given their clearest modern form by US Secretary of State Daniel Webster in 1842, who in complaining to the British of their attack of a mischievous US ship on the Niagara River wrote that the need to act preemptively must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”²¹ Webster also asserted that the preemptive action must be proportional to the threat it intends to preempt.²² Webster was in effect arguing for the application of the two just war criteria of last resort and proportionality to the question of preemption in international law. (The British conceded

¹⁹ James Turner Johnson, *Just War Tradition*, 30.

²⁰ Anthony Clark Arend, “International Law and the Preemptive Use of Military Force.” *Washington Quarterly* (Vol. 26, No. 2, 2003). (Accessed online 26 June 2004.)

²¹ As cited in Arend.

²² Ibid.

Webster's points and apologized for the incident.) The UN Charter does not condone preemption explicitly and there is tension between the customary legitimacy of preemption and its prohibition by code.²³ But deliberations within the UN itself on anticipatory actions have been centered on questions of imminent threat, last resort, and proportionality, indicating that international jurisprudence continues to allow for the possibility that a preemptive war can be just.²⁴

Not so for preventive war, which goes farther than preemption in anticipating threats. Prevention is a "cold blooded" strategy undertaken before a crisis is ongoing or imminent. It is intended not to eliminate threats that are fully formed, but to prevent threats from forming in the first place. "Prevention exploits existing strategic advantages by depriving another state of the capability to pose a threat and/or eliminating the state's motivation to pose a threat through regime change."²⁵

The terms "self-defense," "preemption," and "prevention" appear frequently in discussions over the justice of particular wars, and this may have contributed to the conflation of these terms with just war categories. But the fact is that the strategies of self-defense, preemption, and prevention do not arise from just war thinking or any other ethical system, meaning that there is no analytic relationship between the two types of descriptors. In other words, just war doctrine can rarely render *a priori* judgments upon security strategies; the verdict depends on the specific circumstances of each case. In that vein, one author warns that concepts like preemption and prevention "are really about the timing and method of war; they say nothing about the moral content of the conflict itself, and in the end an emphasis on them obscures the fundamental question of justice."²⁶ The next section attempts to clarify the relationship between prevention and justice, if there is one.

²³ Johnson, *Just War Tradition*, 30.

²⁴ Arend.

²⁵ Freedman.

²⁶ Thomas M. Nichols, "Just War, Not Prevention," *Ethics and International Affairs* 17, no. 1 (2003): 25.

C. THE JUSTICE OF PREVENTIVE WAR

An advocate of a specific preventive war would be challenged by a just war jurist on many grounds. But on a theoretical level, preventive war fails the modern just war test by a slim margin, failing to meet only a single criterion: last resort. The proponent of prevention is concerned mainly with what is the *best* resort in terms of national interests now and in the future, and purposefully seeks to avoid the circumstance of having his available courses of action gradually eliminated by the growing capabilities of an adversary, regardless of plausible alternatives to war. Therefore, all preventive wars are necessarily unjust according to modern just war doctrine so long as it insists on last resort as a criterion for justice. But what is the basis of that criterion, and does it remain valid?

1. Examination of Last Resort

In our time, last resort appears to be a natural criterion for a just war. But last resort threads in and out of just war doctrine and has had different connotations at different times. Cicero mentions last resort, giving the concept a substantial pedigree.²⁷ It was not included explicitly in St. Thomas Aquinas's three *jus ad bellum* criteria that war must be declared by a proper authority, for just cause, and for a right intention. However, it must be noted that a declaration of war, following Roman tradition, implied last resort by giving a potential enemy the opportunity to satisfy demands; in that context, war was a last resort to be undertaken if the enemy refused.²⁸ In parallel with this line of thinking was a separate idea from the proper authority criterion that a war could not be just unless there was no higher authority to which a polity could appeal for a redress of grievances.²⁹ We see both of these elements—a refusal of an adversary to provide satisfaction and the absence of an alternative means of compulsion—in the modern idea of last resort. So conceived, the criterion of last resort has a purely formal basis.

But the blindness of last resort to prudential concerns is its first and most obvious vulnerability. When faced with the choice of war or peace, decision makers must weigh the costs and benefits of fighting, as well as the costs and benefits of *not* fighting, and

²⁷ Christopher, 12.

²⁸ Ibid, 51.

²⁹ Ibid.

those balances shift, often toward greater calamity, during the deliberation. In other words, waiting for war to become the “last resort” has its own costs and risks that should be considered under the teleology of the proportionality criterion, but the last resort criterion prohibits this. This utilitarian imbalance in just war doctrine could be tolerable only in the Middle Ages or early modern period, when a) military capabilities of states were relatively static, b) states were not subject to immediate lethal threats, and c) the costs of war were high compared to their ends. None of these conditions can be assumed to obtain in today’s international environment. Another argument on this theme is that the alternatives to war incur their own human costs, often more indiscriminately than war itself. This leads Peter Temes to reject last resort explicitly as a criterion for “a just war theory for the twenty-first century”:

The Catholic just war principle of last resort is pointedly not among the criteria that I suggest we affirm... What nations do instead of war—blockades, propaganda campaigns, and restrictions on trade—often accrue terrible harm for the weakest among an enemy nation’s civilians while leaving the military and political leadership intact. Thus they enact precisely the reverse of the discrimination principle.³⁰

A second difficulty with the last resort criterion is the epistemological problem of knowing what “last” is. As Walzer observed in assessing the justice of the 1991 Gulf War, “we can never reach lastness, or we can never know that we reached it. There is always something more to do: Another diplomatic note, another UN resolution, another meeting.” Walzer concluded that, at least in the context of Desert Storm, the criterion of last resort “doesn’t seem to play an important role.”³¹ Stated more generally, measures short of war are capable of admitting failure only at preventing harms from happening; the harmful event itself is the mark of the failure. But when those measures are aimed instead at bringing about some event—withdrawal of an aggressor, restitution of a wrong done, etc.—there is no obvious point at which the effort can be said to have failed and the criterion of last resort to be met. Modern international law and institutions exacerbate this difficulty by providing a potentially interminable menu of penultimate alternatives to

³⁰ Peter Temes, *The Just War: An American Reflection on the Morality of War in Our Time* (Chicago: Ivan R. Dee, 2003), 168.

³¹ Walzer, *Just and Unjust Wars*, 2nd ed. (New York: Basic Books, 1992), xiv. See also Walzer, “Excusing Terror,” *The American Prospect* 12, 18 (Oct 21, 2001): 17 for a similar critique of last resort as a justification for terrorism.

war. The result is that the last resort criterion has a status quo bias—desirable when conditions of justice prevail, but equally undesirable when an injustice exists.

The final problem with the last resort criterion is a moral one that muddles even the apparently clear case of war as a last resort against aggression. What circumstances is one to tolerate before war is the “last” resort? An example is the divergent reactions of Czechoslovakia and Poland to Hitler’s demands in 1938-39: One chose surrender and one chose resistance, indicating that the very concept of national existence—the most basic value of realism and the backstop of any formulation of last resort—pivots on a moral judgment of what kind of existence is worth having.³²

In light of this analysis, the last resort criterion appears to be highly unreliable, even as a component of a doctrine that purports only to provide a general ethical framework for evaluating the justice of war. In fact, it is doubtful that “last resort” is an ethical guideline at all: It might be more accurately described as a *substitute* for an ethic, because instead of informing a decision between plausible choices, last resort demands that we wait until such a choice no longer exists—regardless of the harm that accrues in the meantime. Indeed, when just war authority J. Bryan Hehir criticizes the recent war in Iraq as “optional” and invokes the criterion of “necessity” as a “cognitive test to last resort,”³³ he implies that no *choice* for war can be just; war must be forced upon us. But this criterion of necessity inevitably founders on the same rocks charted above: Hehir contrasts the US war against Iraq in 2003 to the “necessary” US wars against Japan in 1941 and against North Korea in 1950, but does not explain why the United States could not have allowed Japan to have its way in East Asia or attempted to coax North Korea out of the South with international diplomatic pressure *ex post facto*. Since the choice to not fight is always available, fighting is always a choice as well. Attempts to hide from that reality under the cover of necessity seem only to obscure the real ethical bases upon which those choices must be made.

³² Arnold Wolfers, as cited in Michael J. Smith, “Humanitarian Intervention: An Overview of the Ethical Issues” in *Ethics and International Affairs*, 2nd ed., Joel H. Rosenthal, ed. (Washington D.C.: Georgetown University Press, 1999), 282. Walzer notes the same contrast in *Just and Unjust Wars*, 52.

³³ J. Bryan Hehir, “An Unnecessary War: How Will It Be Conducted?” *Commonweal* 130, no. 6 (Mar 28, 2003): 7.

2. Other Criteria

Further examination reveals that a preventive war, while potentially objectionable to just war sensibilities, does not fail additional *jus ad bellum* criteria necessarily. To begin, the just war jurist might attack preventive war on the grounds of just cause. A preventive war is ostensibly concerned with protecting a state from a future threat, and thus has self-defense as its cause. Yet self-defense against a threat that does not yet exist is necessarily speculative; the proponent of preventive war could not point to any evidence that objectively proves his case. Further, every state by its very nature constitutes some possible future threat to every other, making causes for preventive wars ubiquitous and defining the term “self-defense” to near uselessness. Richard K. Betts warns that “when security is defined in terms broader than protecting near-term integrity of national sovereignty and borders, the distinction between offense and defense blurs hopelessly... security can be as insatiable an appetite as acquisitiveness—there may never be enough buffers.”³⁴

In a related issue, discerning right intention on the basis of a cause of preventive self-defense is difficult. The only reliable way to completely and permanently eliminate the potential future threat of a rival is often “to change the political character” of the target state³⁵ or to simply conquer it, actions difficult to distinguish from pure aggression. These are compelling challenges, yet they do not assert that just cause and right intention are impossible in a preventive war; they only assert that demonstrating just cause and right intention are highly problematic. To this extent, the problems that just cause and right intention raise in preventive wars are not so much ethical as they are practical.

On the other side of the deontological/teleological divide, the just war jurist would have even more difficulty indicting a proposed preventive war on the prudential criteria. While a proponent of preventive war could not point to evidence of an imminent threat, he might well be able to make a strong case for the future development of a threat based on the nature of a state, including its ideological basis, current leadership, or past

³⁴ Betts, *Surprise Attack: Lessons for Defense Planning* (Washington, D.C.: Brookings Institution, 1982), 14-43, as cited in Neta Crawford, “The Slippery Slope to Preventive War,” *Ethics and International Affairs* 17, no. 1 (2003): 32.

³⁵ Freedman.

behavior. No legal standard of proof need be attained in this utilitarian domain: The proponent needs only to demonstrate that preventing that danger from arising would likely require the expenditure of less blood and treasure than waiting for the threat become imminent or actual. Even if the proponent had no pretensions of certainty about the future threat, a mere probability of it developing—if the effects were sufficiently severe—could demand action. Moreover, it is conceivable that preventive action could be the only chance of success that a state has at protecting itself from certain types of threats. Finally, the proponent could also cite humanitarian benefits that might arise from a preventive war that are separate from its external threat altogether.

These arguments could bestow a utilitarian merit to a proposed preventive war that would clearly distinguish it from the amoral interstate competition that is inherent in the international system. It would be difficult to indict a preventive war as a pretext or as “unjust” if it can convincingly claim to minimize the harms that just war doctrine itself aspires to minimize. There are fairly obvious historical cases when a preventive war would have likely accomplished the same end as a “just” war of self-defense with significantly less cost in lives and resources on both sides,³⁶ thereby not only satisfying the proportionality criterion, but turning it against the position that prevention cannot be a just cause.

3. Objections to Preventive War

Nonetheless, it is the potential of prevention to be used as a pretext for aggressive war—a potential that states have frequently exploited—that lies at the root of objection to it. Just war theorists have long regarded preventive wars as unjust *ipso facto*, and in precise contrast to self-defense, prevention is often cited as the quintessential unjust cause. In *De Jure Belli*, Grotius begins his chapter on unjust causes of war with an account of the tendency of rulers to “colour over their real motives with justifiable pretexts,” and the very first pretext he addresses is that of a state attacking another because of the erection of fortifications that could unfavorably alter balances of power—a

³⁶ Betts, in “Striking First,” acknowledges only one case of a preventive war—as opposed to a preemptive war—that was “not fought but should have been”: the French decision not to attack Hitler in 1936, after he remilitarized the Rhineland. Betts finds no cases of actual preventive wars that proved justified, but it is unclear how one could proceed with such a proof.

reference Sparta's claim against Athens in the Peloponnesian War.³⁷ More famously, Grotius wrote that "to maintain that the bare probability of some remote, or future annoyance from a neighboring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity."³⁸

More recently, in illustrating the concept of just cause for the purpose of judging the current war on terrorism, Neta Crawford announces plainly that "preventive war, waged to defeat a potential adversary before its military power can grow to rival your own, is not just."³⁹ Elsewhere, Crawford summarily dismisses the justice of preventive wars because such wars "assume perfect knowledge of an adversary's intentions when such a presumption of guilt may be premature or unwarranted."⁴⁰ Betts writes that "preventive war is almost always a bad choice, strategically as well as morally," and that "it is almost never possible to know with enough certainty that a war is inevitable."⁴¹ Walzer has a similar distaste for prevention:

Preventative war presupposes some standard against which danger is to be measured. That standard does not exist, as it were, on the ground; it has nothing to do with the immediate security of boundaries. It exists in the mind's eye, in the idea of a balance of power, probably the dominant idea in international politics from the seventeenth century to the present day.⁴²

Several themes emerge from these objections. First is their realist balance-of-power paradigm, in which preventive war is assumed to be driven by the inherent characteristics of an anarchical international system—specifically, aspirations for power by sovereign states. The authors cited above are not necessarily "realists" in that they advocate *realpolitik*, but the policies they recommend are informed by the realist description of the international environment. This paradigm has several limitations, all stemming from the assumption that states are the primary actors in the international system and thereby the only significant sources of interstate violence. (The difficulty that

³⁷ Grotius, Bk. II, Ch. 22, III.

³⁸ Ibid, Ch. 1, XXII.

³⁹ Crawford, "Just War Theory and the US Counterterrorism War," *Perspectives on Politics* 1, no. 1 (March 2003): 7.

⁴⁰ Crawford, "The Slippery Slope to Preventive War."

⁴¹ Betts, "Striking First," 18.

⁴² Walzer, *Just and Unjust Wars*, 76.

the realist paradigm has with describing the current threat of mass-casualty terrorism will be explored in the next chapter.) The second theme of categorical objections to preventive war is the attention given to “fear” derived from “bare probabilities” of future danger, which Walzer distinguishes from a threat that is demonstrable by facts.⁴³ The argument here appears to be that because “human life exists under such conditions that complete security is never guaranteed to us,”⁴⁴ no level of perceived insecurity—that is, insecurity felt in the absence of objective evidence of a threat—can be admitted as a cause for war. The third theme, closely related to the second, is the subjectivity of the alleged threat that a preventive war aims to prevent. The inevitability of such a threat can never be proved.

4. Prevention as Not an Unjust Cause *A Priori*

Equally important for the topic at hand, however, is that neither may it be disproved. The subtle equivocations that just war ethicists are forced to include in their objections to preventive war are telling. Crawford can only say that fears of a future threat that motivate a preventive war “may be” unwarranted; Betts must be satisfied with the qualified statement that the rationale for preventive war is “almost never” certain. And Walzer could not argue that danger apprehended “in the mind’s eye” is always irrational. Nonetheless, Walzer derives a “moral necessity of rejecting any attack that is merely preventive in character” because “it will always be *a charge against us*” [emphasis added] that we attacked unjustly,⁴⁵ not necessarily because we *did* attack unjustly.

These writers are by no means the first to be concerned with the problem of subjectivity of causes for war, which reaches an apex in preventive rationales. The question of whether or not both sides in a war can believe that they have just causes was of concern to St. Augustine (354-430 A.D.), considered the founder of the just war tradition.⁴⁶ The question figured prominently in the works of Francisco de Victoria

⁴³ Walzer, *Just and Unjust Wars*, 78.

⁴⁴ Grotius, Bk. 2, Ch. 1, XVII.

⁴⁵ Walzer, *Just and Unjust Wars*, 80.

⁴⁶ See Paul Ramsey, “The Just War According to St. Augustine” in *Just War Theory*, Jean Bethke Elshtain, ed. (New York: New York University Press, 1992), 8-22.

(1492-1546) and Francisco Suarez (1548-1617).⁴⁷ The uncertainty that surrounds decisions of war and peace led Grotius to write that “between wavering opinions the balance should incline in favor of peace,”⁴⁸ and the issue of subjectivity caused him to reject the criteria of right intention, which is necessarily a subjective judgment and therefore beyond the view of law.⁴⁹ More generally, the propensity of both sides in a conflict to subjectively conclude that they are in the right led Grotius to de-emphasize the ethical substance of the *jus ad bellum* “by reducing it to formalities,” thereby enhancing the relative prominence of the *jus in bello*.⁵⁰ This trend continued into the nineteenth century, when positive international law avoided confrontation with the subjectivity of just cause by basically conceding a right of states to wage war and focusing on the conduct of war itself.⁵¹ The international agreements after the First World War, including the Kellogg-Briand Pact and the UN Charter, fled from this subjectivity in the opposite direction by ruling all causes except reactive self-defense illegal. In one sense, these documents reintroduced the question of *jus ad bellum*; in another sense, they came close to asserting that there is no such thing as *jus ad bellum*. This contributed to the solidification of inviolable state sovereignty as the fundamental principle of the international system, a topic to which this paper will return.

Given this history of efforts to banish subjective judgments of just cause from a secularized conception of just war as embodied in international law, the prohibition of preventive war is readily understandable. And, again, prevention can never meet the criterion of last resort, and is therefore formally unjust according to current just war thinking. However, the near universal acceptance of objections to preventive war does not alter the fact that Walzer and others who voice them can provide no *a priori* reason why prevention is an unjust *cause*. Instead, they hold that the inevitable subjectivity of preventive causes—as opposed to the potential objectivity of other causes—is sufficient to reject them in principle. The blanket prohibition of prevention as a just cause,

⁴⁷ See Johnson, *Ideology, Reason, and the Limitation of War* (Princeton: University Press, 1975), 178-195.

⁴⁸ Grotius, Bk. II, Chap 23, VI.

⁴⁹ Ibid., Ch. 22, XVII and Christopher, 88.

⁵⁰ Johnson, *Ideology, Reason, and the Limitation of War*, 232.

⁵¹ Rengger, 359.

therefore, appears to be driven by convenience rather than by strict logic, meaning that Walzer's "moral necessity" to outlaw prevention is actually more of a practical one. The convenience sought is to avoid the thorny legal problem of judging a particular case for preventive war on its own merits; it is certainly easier—and not necessarily unreasonable in practice—to seize upon the potential demerits of other imaginable cases for preventive war and rule out the entire category as unjust.

5. Contradiction between Formal and Prudential Criteria

But regardless of any practical benefits that may be brought by declaring all preventive war unjust, the logical imprecision of such a decree introduces a contradiction between a) the prohibition of a preventive war on the formal basis that it is an unjust cause and not a last resort, and b) the potentially compelling case that might be made for the same preventive war on the basis of just war doctrine's own prudential criteria of proportionality and chance of success. What are national leaders to make of a just war doctrine that can concede the prudence or even necessity of fighting a preventive war, yet prohibit them from doing so for other reasons? This contradiction comes close to being a banality, as all ethical systems seek to bound the limits of acceptable actions that immediate self-interest might motivate, even if those systems derive ethics from self-interest or assert that ethical action is consistent with self-interest in the long-run. To that extent, tension between ethics and self-interest is almost inherent; if there were no such tension, ethics would hardly be necessary.

But the contradiction in just war doctrine's prohibition of preventive war is especially debilitating because the cost of failing to act preventively when it is prudent to do so is measured in the very same terms—the human suffering that arises from living under injustice or fighting against it—that just war doctrine seeks to minimize from the start. Those costs are fundamental and unrecoverable, begging the question of what higher purpose or more refined form of self-interest would be served by abstaining from a certain level of violence now only to be forced to engage in a higher level of violence in the future.

D. CONCLUSION

Just war doctrine is an important basis of our conceptions of war and peace and provides a framework for considering the justice of war. When the security strategy of prevention is subjected to *jus ad bellum* criteria, it necessarily fails to meet only one: last resort. But the criterion of last resort has epistemological and moral shortfalls that render it mostly meaningless and, to the extent that it has any meaning, highly questionable. Moreover, preventive war is not unjust *a priori* according to any other criteria, including that of just cause.

Nonetheless, preventive war is widely held to be unjust because of its apparent incompatibility with an international order designed to suppress the violent behavior of states acting in accordance with realist predictions. The difficulty in qualifying preventive war by any formal, objective criteria opens the door for prevention to be used as a pretext by any state that wishes to launch a war of aggression against another. Prevention is thus excluded as a just cause as a matter of practical necessity. However, that exclusion contains a contradiction: just war doctrine insists that decisions of war and peace must incorporate utilitarian calculations of the proportionality of means and ends, yet the last resort criterion forces leaders to refrain from war until it becomes unavoidable, no matter what the cost of waiting may be. Implicit in objections to preventive war is a judgment that the current international system itself—which the legitimization of preventive wars would alter—has its own value that justifies the unqualified prohibition of preventive war. The actual value of the international system at suppressing current threats is the topic of the next chapter.

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III. CHALLENGES TO THE CURRENT INTERNATIONAL ORDER AS A VALUE IN JUST WAR THINKING

A. PREVENTIVE WAR AS A THREAT TO THE CURRENT ORDER

The preceding chapter concluded that ethical objections to preventive war are expressions of practical concerns that the international system itself—in which preventive war is illegal—serves a vital role in suppressing interstate violence. Legitimization of preventive war is widely believed to “undermine existing beneficial norms constraining the use of force.”⁵² These current norms, in turn, are aimed at the “modest and narrow goals” of preserving “international restraint and stability”—goals which arise from the classical realist description of international threats.⁵³ Crawford has these goals in mind when she warns of the potential dangers of the new US strategy:

A preventive-war doctrine undermines international law and diplomacy, both of which can be useful—even to hegemonic powers. Preventive war short-circuits nonmilitary means of solving problems. If all states reacted to potential adversaries as if they faced a clear and present danger of imminent attack, tensions would escalate along already tense borders and regions. Article 51 of the UN Charter would lose much of its force. In sum, a preemptive/preventive-war doctrine moves us closer to a state of nature than a state of international law.⁵⁴

The incompatibility between prevention and international law arises from the subjectivity of judgments that the United States would rely upon to implement its policy; as chapter II pointed out, such subjective judgments are inherent in preventive strategies. With this subjectivity in mind, critics of the new US strategy frequently invoke the image of the United States as a “neoimperial” power that “arrogates to itself the global role of setting standards, determining threats, using force, and meting out justice. It is a vision in

⁵² Buchanan and Keohane, 9.

⁵³ Hehir, “The New National Security Strategy,” *America* 188, no. 12 (April 7, 2003): 11.

⁵⁴ Crawford, “The Best Defense: The Problem with Bush’s Preemptive Doctrine,” *Boston Review*, (Feb/Mar 2003). Available online at <http://bostonreview.mit.edu/BR28.1/crawford.html> (accessed 22 Jun 2004).

which sovereignty becomes more absolute for America even as it becomes more conditional for countries that challenge Washington's standards of internal and external behavior."⁵⁵

Again, these arguments do not follow from any *a priori* injustice of preventive war. Instead they arise from the harmful empirical effects in the international system that might result from the availability of the preventive rationale as a potential just cause for war. The critical point is not whether all preventive causes would be mere pretexts for wars of aggression, but rather that preventive causes would indeed be used for that purpose, thereby thwarting any attempts of international law to limit war through *jus ad bellum* controls. The resulting proliferation of speciously-justified wars could bring more net harm to the international system than would the occasional prohibition of preventive wars that were otherwise prudent. In a sense, this argument expands the field-of-view of the proportionality criterion by raising questions about the structural effects of a preventive war beyond the war itself.

This proportionality calculation pivots on the value one assigns to the current international order in and of itself, based on the principle of inviolable state sovereignty and concordant limitations on the when states may resort to war. To the authors cited above, the current order outweighs all other values that might be uniquely obtainable by legalizing preventive war. This is one of the ways that "the contemporary legal *jus ad bellum*... incorporates a positive valuation of the international status quo" at the expense of other values.⁵⁶ Order is indeed a fundamental value, not to be taken for granted. Hedley Bull observes that "not only is order in world politics valuable, there is also a sense in which it is prior to other goals..." But Bull continues, "The proponent of order takes up his position partly because the existing order is, from his point of view, morally satisfactory, or not so unsatisfactory as to warrant its disturbance."⁵⁷ Thus, the current system must be justified not simply by its ability to provide order, but its superiority to other plausible orders. So how satisfactory is the current international order from our

⁵⁵ G. John Ikenberry, "America's Imperial Ambition," *Foreign Affairs* 81, no. 5 (Sep/Oct 2002): 44.

⁵⁶ Johnson, *Just War Tradition*, 328.

⁵⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), 97.

point of view? Specifically, how effectively does the current international order provide what Bull lists as one of the four primary goals of a society of states: “limitation of violence resulting in death or bodily harm”?⁵⁸

The first issue that must be addressed is that the nature of the current international order is an unsettled issue. It is well documented that the current system is either under stress or already changed from its Cold War configuration. Uncertainty as to the current state of affairs is evidenced by “the absence of a consensus even on what to call the new system... We agree only on the term ‘post-Cold War’ and on the idea that we have no exact model for the kind of international system in which we find ourselves.”⁵⁹ States remain the primary actors in the system, and there is no shortage of potentially devastating conflicts that could break out along international boundaries. But the new urgency of combating non-state threats “requires a questioning of sovereignty—the holy concept of realist theories. The classical realist universe of Hans Morgenthau... may therefore still be very much alive in a world of states, but it has increasingly hazy contours and offers only difficult choices when it faces the threat of terrorism.”⁶⁰ Whatever the current international system is, old assumptions about the fundamental nature of international relations, based largely on the realist model, no longer appear to be adequate:

The new, dynamic, unsettled international environment has exposed the limits of a conceptual framework derived from a period in which international politics was dominated by great-power rivalries and international law gave overriding respect to the rights of states, no matter how brutal their internal policies.⁶¹

Yet, many commentators seem almost desperate to cling to a conception of an international system that can fit neatly into realist categories. The reason, perhaps, is that many international institutions, the UN foremost among them, exist precisely because of a perceived need to mitigate realism’s stark predictions for international relations.

⁵⁸ Bull, 19.

⁵⁹ Michael J. Smith, “Humanitarian Intervention: An Overview of the Ethical Issues” in *Ethics and International Affairs*, 2nd ed., Joel H. Rosenthal, ed. (Washington D.C.: Georgetown University Press, 1999) 272.

⁶⁰ Stanley Hoffmann, “Clash of Globalizations,” *Foreign Affairs* 81, no. 4 (Jul/Aug 2002): 107.

⁶¹ Freedman.

Accomplishing those goals has involved value judgments—essentially, tradeoffs between order and justice. A reassessment of the sources of danger in the international system threatens the validity of those judgments, which are institutionalized in the UN Charter. Legitimization of the preventive component of the US security strategy “threatens the ‘conservative’ fabric of world politics shaped over four centuries and crystallized in the UN system’s recognition of sovereignty, prohibition of intervention and refusal to accommodate unilateral use of force beyond individual or collective self-defense.”⁶² The success of the UN at limiting violence in interstate relations is highly debatable, of course, but the fact remains that the main aspiration of the current international order is to suppress that particular type of danger.

Thus, the realist description of international threats is at the heart of assertions that preventive war is unjust *ipso facto*, from Grotius onward. That prohibition is a value judgment intended to minimize interstate violence, which is understood in terms of the realist premises that “a state’s military and economic power determines its fate; interdependence and international institutions are secondary and fragile phenomena; and states’ objectives are imposed by the threats to their survival or security.”⁶³ The prohibition of preventive war is a reasonable moral approximation only to the extent that these assumptions are true. But their truth is increasingly doubtful. One author renders the verdict that the UN Charter “is grounded on a premise that is simply no longer valid—the assumption that the core threat to international security still comes from interstate violence.”⁶⁴ An examination of the ways that current threats of terrorism and weapons of mass destruction defy this premise yields a strong case against the viability of ethical and legal constraints on war that arise from it, including the blanket prohibition of preventive war.

⁶² Hehir, “The New National Security Strategy,” 12.

⁶³ Hoffmann, 105.

⁶⁴ Michael J. Glennon, “The New Interventionism: The Search for a Just International Law,” *Foreign Affairs* 78, no. 3 (May/June 1999): 2.

B. INVERSION OF THE ROLE OF POWER

Throughout the history of states, the ability of a state to protect itself and threaten others depended on its power. Of course, even the greatest states have come to ruin after miscalculating the extent of their power, and excessive power invites the growth of opposing forces, sometimes leading to conflict. But these are secondary effects; fundamentally, power has been the currency of security. For example, during the Cold War, the threat of Soviet tanks in Eastern Europe could be balanced by NATO tanks in Western Europe; Soviet bombers could be offset by NORAD fighters. The Soviet capability to threaten the United States was constituted by its own power and limited by US power, and the inverse was equally true. One of realism's core premises, that power is a universal value sought by states, rests on the idea that power contributes positively to the security of a state. This not only drives interstate competition, but has the potentially beneficial effect of allowing states to find peace in balances of power.

This fundamental premise is no longer obtains in the West's current struggle with Islamic terrorism. The capabilities that al-Qa'ida used to kill 3,000 people on September 11 2001 were not theirs; they were *ours*. "The only technical mastery displayed by the terrorists of 9/11 was the ability to hijack and to fly jumbo airliners into extremely large buildings, neither of which they were capable of constructing themselves."⁶⁵ The further a state or a civilization advances, the greater the capability of actors such as terrorists to inflict harm upon it. The advancement of technology and the rise of globalization in the West, both of which are correctly perceived as critical underpinnings of prosperity, are precisely what allow a group like al-Qa'ida to constitute a threat.

As Joseph S. Nye has observed, "In the 20th century, malevolent individuals such as Hitler and Stalin needed the power of governments to be able to kill millions of people. If 21st-century terrorists get hold of weapons of mass destruction, that power of destruction will for the first time be available to deviant groups and individuals."⁶⁶ And as evidenced by 9/11, terrorists do not even require WMD to kill in large numbers; they can merely transform peaceful capabilities into destructive ones at opportune times.

⁶⁵ Harris, 26.

⁶⁶ Joseph S. Nye, "The Debate over Iraq: Is Military Action Justified? Right War, Wrong Time," *Newsday*, 16 March 2004.

These observations go beyond the simple fact that advanced states have more to lose from attacks or that weak adversaries can use asymmetric tactics, both of which are reconcilable with the realist model of threats. The key point is that the instruments of mass-casualty terrorism are integral to advanced states themselves. As a result, terrorism turns the fundamental role of power in the international system, as understood by realism, on its head: The most powerful societies are no longer the most secure from attack, but the most exposed to it.

C. NON-STATE ETHICS

In addition to being exempt from the requirement to build their own capabilities, terrorist groups are exempt from the requirement to build their own societies. Consequently, terrorist groups are unhindered by a burden that drives the development of certain characteristics of states—at least successful ones—that are important factors in international stability.

Members of terrorist groups like al-Qa'ida, as opposed to state governments, cannot reasonably claim to represent any society. Walzer and his colleagues at *Dissent* address this basic issue in one of their initial responses to the 9/11 attacks, noting that “Terrorism, after all, doesn't require mass mobilization; it is the work of a tiny elite of militants, who claim to represent ‘the people’ but who act in the absence of the people.”⁶⁷ Johnson further explains that terrorism in its al-Qa'ida form is:

the action of a self-constituted private group to achieve its own ends. Such groups or private individuals who commit terrorist acts for their own reasons do not have what the “just war” theory and the *jihad* theory alike require of those who initiate use of violent force—namely, responsibility for the well-being of a recognizable political community and act on behalf of the common good of that community.⁶⁸

Terrorism's lack of “proper authority” is a central ethical issue: It frustrates the efforts of states to counter it without violating *jus in bello* rules, and it is the only juridical

⁶⁷ Walzer, Leo Casey, Michael Kazin, James B. Rule, et. al. “Terror and the Response: Five Questions about Terrorism,” *Dissent* 49, is. 1 (Winter 2002).

⁶⁸ Remarks by James Turner Johnson in “Ending Terrorism: A Strategy for the Future (New York Forum #3),” conference of the Carnegie Council on Ethics and International Affairs, February 20, 2002. Available online at <http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/145> (accessed 23 Jul 2004).

jus ad bellum criteria that most terrorist attacks objectively fail.⁶⁹ For these reasons, “global terrorism is not the simple extension of war among states to non-states. It is the subversion of traditional ways of war because it does not care about the sovereignty of either its victims or the allies who shelter [it].”⁷⁰ In practical terms, the fact that terrorist groups have no “responsibility for the well-being” of the people they claim to represent empowers them to act without having to weigh the repercussions of their actions on their surroundings. Terrorist groups can easily evade blame for the retaliatory damage inflicted by victims of terrorism; indeed, retaliatory action is often precisely what the terrorists seek, as a means to bolstering their legitimacy and accomplishing their ends.⁷¹ Unlike political leaders who usually have some interest in the general health of their countries and must consider the risks that war poses to it, the leaders of terrorist groups are not exposed to any similar “downside” for instigating mass violence.

Another consequence of terrorists’ lack of political responsibility is more subtle but very fundamental. It is discernable in the Kantian argument that the burden nature levies upon men to overcome their inherent antagonism toward one another is the primary mechanism that drives man in the direction of perfection.⁷² As Lee Harris points out, a group of people subjected to this challenge can only overcome it and build a sustainable society by developing a “sense of the realistic,”⁷³ which manifests itself not only in politics and technology but, more generally, in the development of viable norms for social behavior. A terrorist group is under no requirement to construct a society, and is thereby absolved of most of the responsibilities of acknowledging reality and living in it ethically. The technologically-advanced, globalized world gives people like Usama bin Laden access to destructive capabilities without requiring him to adopt the ethics that advanced societies had to develop alongside those capabilities in order to survive both

⁶⁹ It is arguable—and many have argued—that the 9/11 hijackers had a just cause, that the attacks were a last resort, etc. See Walzer, “Excusing Terror,” *The American Prospect* 12, 18 (Oct 21, 2001): 16-17 and also chapter 3, “Terrorism: A Critique of Excuses,” in *Arguing about War* for a response to some of these arguments.

⁷⁰ Hoffmann, 112.

⁷¹ See Michael Scott Doran, “Somebody Else’s Civil War,” *Foreign Affairs* 81, no. 1 (Jan/Feb 2002): 22-23.

⁷² Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Intent,” *Perpetual Peace and Other Essays*, Ted Humphrey, trans. (Indianapolis: Hackett, 1983), 29-40.

⁷³ Harris, 26.

domestic and external conflict. Just war doctrine itself is the prime example of such ethics. Advanced nations have frequently fallen short of these ideals and inflicted great harm upon one another, but these ethics do act as constraints on the behaviors of states and underlie the international order. Al-Qa'ida escapes these constraints because it is accountable to no constituency and is invisible to the international system; yet it aspires and has succeeded once already to inflict violence on a nation-state scale. This mismatch between power and ethics is central to understanding Usama bin Laden's "blithe unconcern with the ethics of war"⁷⁴ and the horrendous acts of indiscriminate violence perpetrated by terrorists generally.

D. NON-STATE MOTIVATIONS

The non-state character of terrorist groups liberates them not only from the boundaries of ethics, but introduces the possibility of motivations that exist in a completely different plane from the traditional great-power competition that the international system is designed to suppress. Terrorists may have political goals, but it is impossible to adequately describe the threat of an "apocalyptic" terrorist group such as al-Qa'ida solely in political terms.

Michael S. Doran warns that it is essential to "comprehend the symbolic universe into which [bin Laden] has dragged us."⁷⁵ The symbology is not intended to be understood by United States; instead, "Bin Laden produced a piece of high political theater he hoped would reach the audience that concerned him most: the *umma*, or the universal Islamic community."⁷⁶ Mark Juergensmeyer echoes the idea that the attacks "had no obvious military goal" but should rather be seen in terms of religion:

The authority of religion has given bin Laden's cadres the moral legitimacy to employ violence in assaulting symbols of global economic and political power. Religion has also provided them the metaphor of cosmic war, an image of spiritual struggle that every religion contains within its repository of symbols, seen as the fight between good and bad,

⁷⁴ Berman, 117.

⁷⁵ Doran, 24.

⁷⁶ Doran, 23.

truth and evil. In this sense, attacks such as those on the World Trade Center... were very religious. They were meant to be catastrophic acts of biblical proportions.⁷⁷

Harris notes the lack of follow-up attacks and al-Qa'ida's unconcern with either claiming credit for the attacks or associating them with any specific message or demands, which one would expect if the attack had been intended primarily to win concessions from the United States. He concludes, in general agreement with Doran and Juergensmeyer, that the 9/11 attacks were not acts of "Clausewitzian" terror, but were "a symbolic drama, a great ritual demonstrating the power of Allah, a pageant designed to convey a message not to the American people but to the Arab world."⁷⁸

None of this is to say that the attacks were not planned as rational means to an end; it is simply that the end does not match up with the realist description of states competing for security. According to Robert S. Snyder, "Bin Laden wanted to hurt the United States for its own sake, but his principle goal in attacking America on September 11 was to start a war that would polarize Muslims, thereby delegitimizing moderates linked to the United States."⁷⁹ Doran describes bin Laden's plan in more detail:

America, cast as the villain, was supposed to use its military might like a cartoon character trying to kill a fly with a shotgun. The media would see to it that any use of force against the civilian population of Afghanistan was broadcast around the world... The resulting outrage would open a chasm between state and society in the Middle East, and the governments allied with the West... would find themselves adrift.⁸⁰

Regardless of the extent to which this plan is unfolding, the 9/11 attacks were at least partly intended to conscript the United States into a third party role—a supporting actor in "somebody else's civil war,"⁸¹ with thousands of dead Americans and Muslims as props. This interpretation is consistent with the common view that the war against terrorism is not primarily a struggle between Islam and the West, but a struggle within

⁷⁷ Mark Juergensmeyer, "Holy Orders: Religious Opposition to Modern States," *Harvard International Review* 25, no. 4 (Winter 2004): 35.

⁷⁸ Harris, 15.

⁷⁹ Robert S. Snyder, "Hating America: Bin Laden as a Civilizational Revolutionary," *The Review of Politics* 65, no. 4 (Fall 2003): 327.

⁸⁰ Doran, 23.

⁸¹ Ibid.

Islam itself. The conclusion for our purposes here is that the 9/11 attacks and any future attacks like it have political and religious utilities for al-Qa'ida's leaders and followers that are very different from the traditional interstate competition for power envisioned by the realist model and current international institutions.

E. THE INTERNAL CHARACTERISTICS OF STATES

If the 9/11 attacks were consequences of an internal struggle in the Muslim world between secular states and religious fundamentalists, as Doran, Snyder, and others argue, it follows that those states—and what goes on inside them—are highly relevant to US national security. The threat presented by these states can take two forms, one traditional and direct, the other new and indirect.

1. The Direct Threat of Illiberal States

The first form is of the classical state-versus-state type. It is beyond the scope of this paper to address the potential of rogue states to inflict harm upon the United States using unconventional means, foremost among them being the covert use of WMD and/or liaison with terrorist groups. Regardless of those dangers, that kind of threat remains largely consistent with the realist framework, and embellishments of realist solutions—deterrence, balance of power, etc.—and institutional controls may be effective with varying degrees of reliability.

It is worth mentioning, however, that many of these states benefit—if one can call it that—from the same excusal from reality that is enjoyed by terrorist groups. In what Harris calls “one of the deepest contradictions of the liberal system of national self-determination,” governments that fail to confront reality in their domestic or foreign policies are nonetheless preserved by an international system, grounded in the power and wealth of successful states, that recognizes their sovereignty as inviolable and even sustains them with the purchase of oil. In this “dialectical reversal,”⁸² states that would otherwise cease to exist because of inherent flaws are able—even forced—to persist, creating security risks and condemning the people inside those states to governments that

⁸² Harris, 27, borrowing from Hegel.

are under little pressure to modernize. This interpretation, while certainly incomplete, sheds light on the apparent durability of the relatively primitive state of governance in the Arab world.⁸³

2. The Indirect Threat of Illiberal States

The second form of threat from these states is indirect, but for that reason, more difficult to deal with in the current international legal regime. Certain states, even if they seek good relations with the West and adhere to norms of formal international behavior, can nonetheless play significant roles in the existence and character of international terrorism, which poses severe risks to the outside world. These regimes support terrorism directly or simply tolerate it, preside unaccountably over miserable social conditions that fill terrorist ranks, or encourage various hatreds in order to bolster their legitimacy and deflect responsibility for their failures.⁸⁴ These are common policies in the illiberal states in which Islamist terrorism is geographically rooted. In explaining the rise of terrorism in this part of the world, Shibley Telhami writes:

In the Middle East there are political systems that do not allow legitimate political organization for opposition, and there is much despair in the region. There is a felt need for organizing political opposition. This despair is connected to frustration with the political order, the economic order, and foreign policy issues... What bin Laden tries to do is empower those people.⁸⁵

Oppressive and exclusive governance does more than facilitate terrorist recruitment and inflame animosities against external enemies. It plays a significant role in incubating the *means* of terrorism—violence directed against innocent people solely on the basis of their class, ethnicity, nationality, religion, etc.—which “apes or even intensifies the worst aspects of the oppressive regimes from which the terrorists emerge.”⁸⁶ As Walzer notes, this tendency is a common “excuse” for terrorism that is

⁸³ See also Michael L. Ross, “Does Oil Hinder Democracy?” *World Politics* 53, no. 3 (Apr., 2001): 325-361.

⁸⁴ See, for example, Barry Rubin, “The Real Roots of Anti-Americanism,” *Foreign Affairs* 81, no. 6 (Nov/Dec 2002).

⁸⁵ Shibley Talhami, “Understanding the Challenge,” *The Middle East Journal* 56, no. 1 (Winter 2002): 11.

⁸⁶ John Buell, “Terror, Evil, and the New Cold War” *The Humanist* 64, no. 4 (Jul/Aug 2004): 8 (7-11).

conducted by victims of oppressive regimes, where “state terror dominates every other sort.”⁸⁷ When victims of oppression employ terror against their own government, “they are only reacting to someone else’s previous choice, replying in kind the treatment they have long received.”⁸⁸ It is not a great leap to expect that these same individuals might use terrorism against external enemies as well.

This is a formidable topic and can only be sampled here. But, without diverting too deeply into sociology, the relationship between the internal politics of states and terrorism warrants some examination because it goes to the heart of the threat that our ethics on the use of force must be able to meet.

One particularly systematic analysis of the reasons for the rise of terrorism in Islamic civilization is Mohammed M. Hafez’s *Why Muslims Rebel*. Hafez argues that terrorism is often a product of “antisystem ideological frames” that provide three mechanisms of moral disengagement: ethical justification (indiscriminate violence is permissible to bring about certain objectives), advantageous comparison (terrorism is a minor harm compared to the acts of the terrorists’ enemies), and displacement of responsibility (the terrorists are forced to kill civilians as their only means of self-defense). According to Hafez, state repression and exclusion of the people from political processes—hallmarks of the illiberal regimes of the Arab world—are key factors in the development of these antisystem ideologies and their ruthless utilitarian rationales that endorse the killing of civilians on a large scale.⁸⁹

Another representative work is Paul Berman’s *Terror and Liberalism*, in which he makes a compelling case that apocalyptic terrorism has many similarities to Western totalitarianism, particularly the propensity to direct violence indiscriminately against collective groups. Totalitarianism is neither a necessary nor a sufficient condition for terrorism to arise, but the correlation is impossible to ignore. Referring to *The Rebel*,

⁸⁷ Walzer, *Arguing about War*, 55.

⁸⁸ Ibid., 58. Walzer rebuts this argument after stating it.

⁸⁹ Mohammed M. Hafez, *Why Muslims Rebel: Repression and Resistance in the Islamic World* (Boulder: Lynne Rienner, 2003), 155-162.

written by Albert Camus in 1951, Berman writes that Camus “recognized a crucial reality. He recognized that, at a deep level, totalitarianism and terrorism are one and the same.”⁹⁰

The link between totalitarianism and Islamist terrorism is a hatred of liberal society: hatred of people pursuing their self-interests without regard to higher purposes that cultural critics both inside and outside the West regard as essential to providing meaning in human life. To Islamists, the “Western mind” is “without a soul, efficient, like a calculator, but hopeless at doing what is humanly important.”⁹¹ The various totalitarian movements of the West—Nazism, Italian fascism, communism—differed from themselves and from Islamism only by their identification of what was “humanly important” beyond living blithely in a liberal society: building a new Reich, a new Roman empire, a world free of capitalist exploitation, etc. The violence of these movements arose from an “urge to rebel” inherent in Western liberalism, ostensibly a positive skeptical tendency to question authority. But gradually, the “love of freedom and progress had become weirdly inseparable from a morbid obsession with murder and suicide”⁹² that attached itself to political causes. According to historians Ladan and Roya Boromound, Hassan al-Banna, the grandfather of the Islamist movement and founder of the Muslim brotherhood in Egypt in 1928, adapted the “the idea of heroic death as a political art form” from its origins in the political terror of the French Revolution and modeled his organization on Italian fascism.⁹³

This fusion of Islam and political violence was carried forward by subsequent intellectual icons of modern Islamism such as Sayyid Qutb—who, like many of the 9/11 perpetrators and planners, had spent significant time living in the West. “Qutb’s brand of Islamism was informed by his knowledge of both the Marxist and fascist critiques of modern capitalism and Western democracy.”⁹⁴ While Islamist terrorism has a religious

⁹⁰ Berman, 26.

⁹¹ Ian Buruma and Avishai Margalit, *Occidentalism: The West in the Eyes of Its Enemies* (New York: Penguin, 2004), 75.

⁹² Berman, 26, 28.

⁹³ Ladan and Roya Boroumand, “Terror, Islam, and Democracy,” *Journal of Democracy* 13, no. 2 (April 2002): 7.

⁹⁴ *Ibid.*, 8.

appeal to its perpetrators and its audience, its “religious vocabulary hides [its] true nature as a modern totalitarian challenge to both traditional Islam and modern democracy.”⁹⁵ Apart from this radicalization of Islam in the forms of the Islamist movement and the Iranian Revolution in 1979, totalitarianism also rooted itself in the Muslim world in secular vehicles of communism, Baath socialism, and repressive government in general.

Al-Qa’ida and other groups like it are products of this conflation of political violence and religion. Berman concludes that that

Al-Qa’ida and its allied groups were a nebulous constellation, spread across many countries, and the nebulous constellation rested on solid institutions with genuine power here and there, and the institutions rested on a bedrock of conspiracy theories, organized hatreds, and apocalyptic fantasies: the culture of totalitarianism.⁹⁶

This “culture of totalitarianism,” anchored by the current governments of the Muslim world, is relevant to the topic of the justice of the War on Terrorism. Even in the traditional military arena, the characteristics of the governments of states can and do figure in ethical issues of war and peace involving those states. “We see the adversary’s weapons programs and evaluate them in the context of the nation’s overall political behavior. French and British nuclear weapons should concern no one who is not paranoid. Iraqi and North Korean weapons of mass destruction should concern everyone who is not in denial...”⁹⁷ The connection between the internal qualities of a state and the security of others around it is hardly a new concept: It was the primary motivation of the drafters of the UN Universal Declaration of Human Rights,⁹⁸ ratified shortly after the Second World War, for example.

With respect to non-traditional threats, the internal characteristics of states are perhaps even more important. The illiberal states that compose the Muslim political landscape are potential nexuses of the most intractable threats to international order and US security. They have the capacity to develop or otherwise acquire tremendously

⁹⁵ Ibid., 6.

⁹⁶ Berman, 181.

⁹⁷ Robert Royal, “Just War and Iraq” in *Would an Invasion of Iraq Be a “Just War”?* US Institute of Peace Special Report 98 (Jan 2003), 9.

⁹⁸ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 36-37.

destructive weapons even though they might lack any moral constraints on using or proliferating them, and their totalitarian cultures can facilitate dangerous foreign policies or incubate fanaticism within their borders. Clearly, the mix of these dangers varies by state, and because of their indirect character, they generally do not take the form or match the scale of traditional state-versus-state threats. Nonetheless, many of these illiberal states are the “crossroads of radicalism and technology”⁹⁹ whose very existence constitutes a hazard that is distinct from the nominal direct threat posed by every state against every other. These threats are indescribable by realist theory, and as a consequence, the current international legal regime based on the UN Charter is largely “oblivious” to them.¹⁰⁰

F. CONCLUSION

The prohibition of preventive war is taken to be an essential element of the current international order, which is designed to suppress the kinds of threats that are evident in the realist model of international relations. This model holds that threats arise from states as they pursue power towards the end of achieving security. Since all states must act in this way, the internal characteristics of those states are not fundamental factors in the security environment. Much of the international legal and institutional efforts of the twentieth century were directed against this category of threat.

But new categories of threats have arisen that rival interstate conflict in potential severity and defy realist description, thereby challenging the validity of existing international limits on war, including the prohibition of prevention. Specifically, the threat of mass casualty terrorism and weapons of mass destruction introduces non-state actors into the environment, thwarts the ability of states to find refuge in power or balances thereof, and exposes states to violence perpetrated for reasons apart from traditional interstate competition. All of these are factors that the realist model cannot abide. An additional challenge to the realist model is that the internal characteristics of

⁹⁹ Speech by President George W. Bush at West Point, New York, 1 June 2002, as cited in *National Security Strategy of the United States September 2002* (Washington, D.C.: White House, 2002), 13. Available online at <http://www.whitehouse.gov/nsc/nss.pdf> (Accessed 26 July 2004).

¹⁰⁰ Glennon, 3.

states are relevant in today's security environment. This is true for two distinct reasons, and a conflation of these reasons appears to be a major cause of divergences of opinions on the ethics of preventive war.

First, illiberal states may present a direct state-versus-state threat that is motivated by ideological differences and/or traditional security concerns. This is not a new reason for interstate tension, and it remains consistent with a realist description of the international environment even if the possible availability of WMD and unconventional means of attack make the threat less manageable. The second form of threat arises from the indirect role that illiberal states play in constituting a terrorist threat to the United States. This type of threat *is* a relatively new phenomenon, going hand-in-hand with the rise of global terrorism and the increased availability of WMD. It confounds the realist model because the proximate threat actor is a non-state entity.

Opposition to preventive war such as that voiced by Crawford and Walzer is generally framed solely in the context of the first form of the threat from illiberal states—the direct form. This is the type of threat against which preventive war is a highly objectionable remedy because all states, regardless of the nature of their governments, pose a direct threat to each other in theory. The reason for hostile relations among them might be traced to ideological differences, but this is incidental. In these cases, it is impossible to define objective *jus ad bellum* criteria to limit preventive war because ideological differences between states are ubiquitous and symmetrical, meaning that justifications for preventive wars on these grounds would be legally boundless. The legalization of preventive war on this basis would effectively allow a state to attack any other that it simply dislikes.

But a preventive war doctrine can also arise from a desire to combat the second form of threat posed by illiberal states: their role—purposeful or not—in the existence of terrorism and the potential danger of them putting terrorists in contact with WMD. This form of threat is neither ubiquitous nor symmetrical: there is a strong correlation between illiberal regimes and the threat of terrorism. This means that *a preventive approach against terrorism may be bounded by objective criteria regarding the nature of the states that correlate with its existence*. A preventive doctrine qualified by some ethical

evaluation of the nature of the state in question would threaten the existing international order only to the extent that one believes that the inviolability of the most oppressive regimes are a necessary component of that order. In light of this, predictions that the legitimization of the “Bush Doctrine” would necessarily have catastrophic effects on world peace appear to be overblown.

In the meantime, proponents of a preventive strategy make a very rational case, only some of which is outlined above, that certain states are critical elements of a transnational phenomenon that produces apocalyptic terrorism and threatens to arm it with nuclear, chemical, and biological weapons. The merits of this case and the relative weight of the danger are open for debate, but the argument is plausible, and opponents cannot breezily dismiss it as a panicked response to 9/11, latent “imperialism,” or a Machiavellian pretext for the seizure of oil resources. War to change the character of illiberal states in the absence of an imminent threat—or even in the absence of any direct threat whatsoever—has a new potential instrumentality that Grotius did not imagine: to prevent the development of threats that exist beyond states themselves and thus beyond the horizon of the current international system. This is a “new development in the theory and practice of war,” as James Turner Johnson put it, that is once again calling for “an adjustment in the mechanism of restraint.”¹⁰¹

Modifying the ethical and legal basis of international stability carries risks, but “adherence to the just war blanket prohibition” of preventive war is risky also, “given the widespread capacity and occasional willingness of states and non-state actors to deploy weapons of mass destruction covertly and suddenly against civilian populations.”¹⁰² This threat can be viewed as an evolution of the use of violence within the current international system. Just as bacteria gradually adapt to antibiotics designed to kill them, violence has adapted to the international structure designed to suppress it; we call one of these resulting species “terrorism.” In this view, clinging to familiar legal and ethical constraints on international behavior can only empower forms of violence that are powerful precisely because they defy that structure.

¹⁰¹ Johnson, *Just War Tradition*, 172.

¹⁰² Buchanan and Keohane, 3.

Neta Crawford epitomizes this inclination with her conclusion from just war precepts that, if the United States had received clear warning that the 9/11 attacks were about to occur and knew the identities of the participants, “a justifiable preemptive action would have been the arrest of the hijackers.” But any preemptive attack on Afghanistan or al-Qa’ida camps would have been unjust¹⁰³—presumably meaning that the United States would have to sponsor a UNSC resolution against the Taliban and hope that similarly precise and timely warning would appear prior to the next attempted attack.

To borrow the phrase from Justice Robert Jackson, this recommendation literally transforms just war doctrine into a suicide pact. The fact that intellectuals in the West can reach such conclusions suggests that our ideas of just war, particularly those relating to anticipatory actions, are in urgent need of revision. Even so, the general stability provided by the international system remains an important value, and it would be reckless to forsake it in order to confront a threat that, while frightening, does not yet compare to the harm that would arise from a return to “a state of nature” in the international arena, as Crawford fears. The challenge, then, is to protect the current international order as far as possible without protecting international terrorism along with it. The solution appears to lie in carefully defining the mechanism of restraint for the kinds of warfare that are arguably necessary to prevent mass-casualty terrorism. As suggested above, the practical rationale for such wars has a built-in potential for ethical limitation because it is applicable only to states that are illiberal to some extent. The next chapter will investigate the suitability of human rights as an objective basis for the qualified legitimization of preventive war.

¹⁰³ Crawford, *The Slippery Slope to Preventive War*, 34.

IV. HUMAN RIGHTS AND STATE SOVEREIGNTY

A. RIGHTS AS THE BASIS OF THE CURRENT INTERNATIONAL ORDER

1. Theoretical Background

The convergence of just war doctrine and human rights in this thesis is not contrived. Modern just war doctrine and the entire international system have their origins in the rights of individuals. Grotius began *De Jure Belli*, already identified as an important source of modern just war doctrine and a founding document of international law, with an exploration of natural rights. R.J. Vincent, almost certainly with Grotius in mind, remarks that “at least since the seventeenth century, human rights or natural rights have been a conventional starting-place for political theory...”¹⁰⁴ Indeed, Richard Tuck named Grotius “the most important figure” in the history of natural rights.¹⁰⁵ Without the establishment of a basis of natural rights, Grotius’ secular treatise on the proper way for states to behave amongst themselves would have been groundless. Tuck explains the importance of individual rights in Grotius’ conception of state sovereignty:

Grotius was committed to a much more individualistic theory of the state than any of his Protestant contemporaries. The rights enjoyed by the atomic individuals in the Grotian state of nature filled out the moral world: the state possessed no rights which those individuals had not formerly possessed, and was the same kind of entity as them.¹⁰⁶

Predictably, rights figure prominently in Grotius’ analysis of interstate relations. Early in *De Jure Belli*, he identifies rights as the primary determinant of justice in the use of force: “Now right reason and the nature of society... prohibit not all force, but only that which is repugnant to society, by depriving another of his right. For the end of society is to form a common and united aid to preserve to every one his own.”¹⁰⁷ Tuck observes that “the passionate desire for peace (both between states and between individuals) which informs

¹⁰⁴ R.J. Vincent, *Human Rights and International Relations* (Cambridge: University Press, 1986), 111.

¹⁰⁵ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: University Press, 1979), 58.

¹⁰⁶ *Ibid.*, 63.

¹⁰⁷ Grotius, Bk. I, Chap. 2, I.

the *De Jure Belli*, and for which Grotius was most famous, was thus intimately connected with his rights theory: peace required respect for and protection of property, and disputes over rights were the prime cause of war.”¹⁰⁸

More recent theorists exhibit a similar concern for rights. Walzer does not begin his contribution to the just war tradition with a derivation of rights, but he takes their existence for granted and offers them as the metric by which we recognize the harms of war. Walzer prefaces *Just and Unjust Wars* by suggesting that

the arguments we make about war are most fully understood (though other understandings are possible) as efforts to recognize and respect the rights of individuals and associated men and women... At every point, the judgments we make (the lies we tell) are best accounted for if we regard life and liberty as something like absolute values and then try to understand the moral and political processes through which these values are challenged and defended.¹⁰⁹

Later, Walzer advances rights as a condition of peace, saying that “we know the crime [of aggressive war] because of our knowledge of the peace it interrupts—not the mere absence of fighting, but peace-with-rights, a condition of liberty and security that can exist only in the absence of aggression itself. The wrong an aggressor commits is to force men and women to risk their lives for the sake of their rights.”¹¹⁰

Beyond the narrow subject of the justice of war, states themselves and the international institutions that recognize them are similarly dependent on rights for their status. This is more than a theoretical interpretation; the idea is expressed in positive international law. The UN Charter lists “promoting and encouraging respect for human rights and for fundamental freedoms for all” as one of the primary purposes of the organization.¹¹¹ The UN Universal Declaration of Human Rights (UDHR), by listing these rights, asserts the authority of human beings—not states—in international law and

¹⁰⁸ Tuck, 74.

¹⁰⁹ Walzer, *Just and Unjust Wars*, xvi.

¹¹⁰ *Ibid.*, 51.

¹¹¹ *UN Charter*, Art. I, 3.

“suggests that human rights observance is the prerequisite for state authority.”¹¹² Paul Christopher further emphasizes the view that human rights are prior to the rights of states:

The purpose of granting or acknowledging rights for political entities such as states is not for the benefit of the states themselves, but to protect the fundamental freedoms of the constituents of those states. Because the reason for a nation’s “absolute” sovereignty is to protect political independence and self-determination, the right of “absolute” sovereignty is conditional based on its fulfillment of this purpose.¹¹³

In other words, state sovereignty is a means to the end of protecting rights. That is their legal bases as derived by Grotius, and that is the purpose implied by present-day documents such as the UN Charter and the UDHR. Christopher caps this line of thinking with the statement that “when states adopt policies of genocide, slavery, and other heinous injustices, talk of self-determination or political sovereignty is ludicrous.” One guesses that Christopher is speaking directly to Walzer, whose proposed standards for humanitarian intervention, as will be seen, exhibit a striking deference to state sovereignty.

2. The Universality of Human Rights

This thesis has already hinted that a universally-accepted standard of human rights could serve as a qualifier for preventive war. The actual content of that standard, however, is beyond the scope of this work and is not required for its major arguments. It would likely resemble Allen Buchanan and Robert O. Keohane’s definition of “basic” human rights—which would have a legal standing in their proposal for limiting preventive war—as

the most widely acknowledged rights that are recognized in the major human rights conventions. These include the right to physical security of person, including the right against torture, and rights against at least the more damaging forms of discrimination on grounds of religion, gender, race, or ethnicity, as well as rights against slavery, servitude or forced labor, and the right to a means of subsistence.¹¹⁴

¹¹² Carol Devine, Carol Rae Hansen, and Ralph Wilde, *Human Rights: The Essential Reference* (Phoenix: Oryx Press, 1999), 65.

¹¹³ Christopher, 250.

¹¹⁴ Buchanan and Keohane, 4.

Beyond that, the following few paragraphs will only examine the possibility of the existence of such a standard, without going into the details of what that standard might be. The task is made easier by the fact that a universal standard of human rights has been the object of a great amount of international effort, reflected in a body of documents.

The most prominent of these is the aforementioned United Nations Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948. At the most basic level, the very existence of the UDHR indicates a consensus on the idea that universal human rights exist. The drafters of the UDHR were encumbered by the requirement to express human rights in a form that was acceptable by both the capitalist West and the communist East. As a consequence, the UDHR is more a product of diplomatic expedience than philosophical rigor. It is spectacularly silent on the origin of rights—an impressive omission for a document that asserts the authority of those rights—and it expresses human rights so as to be consistent with competing philosophical approaches. For example, even though the document's civil and political rights are taken from the classical Western liberal tradition born in the Enlightenment—the preamble is a “virtual re-write” of the French declaration of rights of 1789, stating that “all human beings are born free and equal in dignity and rights.”¹¹⁵—the reflections of Enlightenment thinking are more linguistic than conceptual. This allows non-Western cultures to buy into the idea of human rights without buying into Western philosophy at the same time.

That said, the UDHR falls far short of being an enforceable universal standard of human rights, and its drafters had no intention that it should serve such a purpose. The main reason for this limitation is that the document enshrines rights from two general categories that are, to a very real extent, mutually exclusive. The first category is “civil and political” rights, which tend to be the negative rights (framed in terms of what governments cannot do) asserted in the political documents of the Enlightenment. These were of primary importance to the Western countries in the drafting of the UDHR. The second category is “economic, social, and cultural” rights, which are generally positive rights (framed in terms of what governments must provide), insisted upon by the

¹¹⁵ Morsink, 281.

Communist countries and Western socialists. The presence of both forms of rights made the document acceptable to countries that spanned a wide ideological spectrum. However, many of these rights, even if desirable in and of themselves, conflict with each other. It is unclear, for instance, how to reconcile a right to private property with a right to food: how can a government provide food to one citizen without seizing it, or some other property in some fashion, from another citizen who has a property right to it?

A vast amount of scholarship has been invested in attacking the distinction between negative and positive rights, the common theme being that the realizations of both civil-political and economic-social-cultural rights have active and passive components.¹¹⁶ In any case, the presence of so many items in the UDHR, whose status as rights is sometimes difficult to discern from their identification as mere values, makes the document less of a demand for freedom and more of a menu of social desiderata to which states may assign their own priorities. As a result, the UDHR is unsuitable as a basis for a minimum standard of rights for the purposes of authorizing war, as would be any document that defines human rights so permissively as to include paid holidays, for example.¹¹⁷

Interestingly in the context of this thesis, Saudi Arabia was one of only eight UN members that abstained from the final vote on the UDHR. The Saudi objections arose from the inconsistency between the rights to marry freely and change religion, on the one hand, and Islamic law on the other. Nonetheless, the Saudis, like the other abstaining votes, participated actively in the endeavor and did not vote against the final product, indicating that they saw some potential for a universal charter on human rights.¹¹⁸ The conclusion for the present purposes is that the definition of human rights is an open issue. There is a consensus that universal human rights exist but none as to what those rights might be—apart from general agreement cited by Allen and Keohane that there is a human right to life and freedom from torture and slavery.

¹¹⁶ See, for example, Jack Donnelly, *International Human Rights*, 2nd ed. (Boulder: Westview, 1998), 24-26.

¹¹⁷ UDHR, *International Covenant on Economic, Social, and Cultural Rights*, Pt. III, Art. 7[d].

¹¹⁸ Morsink, 21, 24.

B. ETHICS OF HUMANITARIAN INTERVENTIONS

1. Walzer's High Standards for Intervention

Regardless of the unresolved issue of human rights standards, human rights already figure directly in discussions of the justice of war in the issue of humanitarian interventions. The use of force in these cases violates the modern international norm of respecting state sovereignty, and the debate over the ethics of humanitarian intervention pivots on the question of what human rights conditions justify this violation. Against the principles of inviolable state sovereignty as a means to the end of international stability, “the growth of humanitarian international law represents an implicit acknowledgement of... transcendent values”¹¹⁹ that can justify military action across international borders in the absence of an earlier attack.

The UN has sanctioned interventions on numerous occasions, giving them some status as customary international law. Nonetheless, the UN Charter does not explicitly authorize humanitarian interventions, seeking to constrain interstate violence within the bounds of self-defense. This creates some tension between positive international law and the moral considerations that drive many states to intervene across international boundaries for reasons that are clearly separate from self-defense (at least to the extent that “self” is defined as the citizens of a given state). Johnson, commenting on this moral shortfall of international law, goes so far as to say that “the contemporary *jus ad bellum* of international law does not measure up to the moral standard of justice; rather, its coalescence around the ‘aggressor-defender’ dichotomy has led to an erroneous stress on the first resort to military force—‘firing the first shot’ or first crossing an international boundary by military force.”¹²⁰

The conflict between state sovereignty and humanitarian concerns is ancient, and protection of the innocent across political boundaries is one of the oldest just causes for war. Augustine identified it, holding it up as morally superior even (or especially) to a war fought for self-defense. Grotius wrote that it is a law of nature that

every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet

¹¹⁹ Johnson, *Just War Tradition*, 328.

¹²⁰ Ibid.

where a Busiris, a Phalaris or a Thracian Diomedes provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.¹²¹

Walzer's ideas on what levels these "cruelties" must attain in order for intervention to be justified have been very influential in contemporary just war discourse, and this thesis will focus on them. He begins with a high degree of deference to state sovereignty. Citing John Stuart Mill, Walzer distinguishes self-determination from political freedom and places a higher priority on the former. His primary justification for this ordering of values is the assertion that freedom cannot be bestowed upon a group of people by an external force; it can only be earned through the virtue of the people and their triumph in a struggle against oppression.¹²² Quite remarkably, Walzer seems to accept Mill's argument that "a state is self-determining even if its citizens struggle and fail to establish free institutions, but it has been deprived of self-determination if such institutions are established by an intrusive neighbor."¹²³

Upon this basis, "the first reading" of Walzer's rule on humanitarian intervention is that "we as outsiders must presume that another state is legitimate unless it has proved otherwise by actions that we cannot ignore."¹²⁴ The human rights violations that rise to this level are those that are so severe as to make talk of self-determination or state sovereignty seem "cynical or irrelevant"—that is, "cases of enslavement or massacre."¹²⁵ In this regard, Walzer's standards appear to coincide neatly with the core of consensus on universal human rights, discussed above: that governments cannot murder or enslave their people.

Walzer faithfully applied this doctrine in his opposition to the recent war against Iraq, going to great lengths to somehow mitigate the dangers of Saddam's regime to the outside world while honoring the right of the regime to rule. One infers that Walzer did not feel that the level of human rights abuses in Iraq rose to the level of justifying

¹²¹ Grotius, Bk. II, Ch. 25, VIII.

¹²² Walzer, *Just and Unjust Wars*, 87.

¹²³ Ibid.

¹²⁴ Smith, 286.

¹²⁵ Walzer, *Just and Unjust Wars*, 90.

humanitarian intervention. As alternatives to a war of regime change, Walzer proposed the extension of no-fly zones over the entire country, the imposition of “smart sanctions,” no-notice reconnaissance flights, stationing of UN soldiers inside Iraq to guard inspected facilities, and forward-deployment of troops on Iraq’s borders.¹²⁶ Such measures would have resulted in Iraq being sovereign in name only, and meet Walzer’s own definition of foreign aggression. Yet, the fact that these policies would have left Iraq’s sovereignty nominally intact seems to have immense significance for Walzer.

2. Comparison to Preventive War

There is a remarkable parallel between the need for an ethical boundary for humanitarian intervention, discussed above, and an ethical boundary for preventive war against terrorism, discussed in the previous chapter. In both cases, there is pressure to violate the norm of state sovereignty, and that pressure arises from that state’s deficient performance in protecting the basic rights of its citizens. In humanitarian interventions, poor human rights conditions are the immediate cause of the desire to intervene; in preventive war, poor human rights conditions present an indirect danger via their role in fomenting international terrorism or their signification that a government cannot be trusted to possess WMD. As shown, Walzer and others insist on high levels of human rights abuses to justify intervention. But this insistence warrants examination for two reasons.

First, there is an inconsistency between Walzer’s high threshold for what abuses of rights justify foreign intervention and his low threshold for what rights abuses justify resistance to foreign aggression. In the latter context, Walzer argues that aggression can exist in many forms and is no less a crime because it is unresisted—that it can occur even without “the fall of blood.”¹²⁷ Thus, Walzer holds that an uncontested invasion or some other form of latent intimidation or coercion is a just cause for war against the aggressor state. Yet at the same time, Walzer holds that uncontested repression of a people by their own leaders—repression so effective as to not require the government to murder or enslave its subjects—fails to justify foreign intervention.

¹²⁶ Walzer, *Arguing about War*, 158-159.

¹²⁷ Walzer, *Just and Unjust Wars*, 52.

For Walzer, then, the difference between the violation of rights by a domestic tyrant and violation of rights by a foreign invader is of stratospheric ethical significance; it is the agent of oppression, not the extent of oppression, that is ethically dispositive. Walzer is aware of this and explains that “recognition of sovereignty is the only way we have of establishing an arena in which freedom can be fought for and (sometimes) won.”¹²⁸ This leads Walzer to the famous domestic analogy: “As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.”¹²⁹

But the domestic analogy has limits, and when the violations of human rights within international borders reach some point, it is irresponsible to avoid the fact that states *are not* individuals. Walzer’s heavy reliance on the domestic analogy to defend the sovereignty of even the most heinous regimes approaches a conflation of means and ends, a common tendency described concisely by Christopher:

It is not unusual for instrumental policies aimed at some primary objective to assume a value of their own, even to the extent that they can actually impede the attainment of the objective they were designed to achieve. In international society, the principle of non-intervention has become sacrosanct, even to the point of disregarding the reasons that underlie its formulation in the first place.¹³⁰

The second reason to question different standards for humanitarian interventions and preventive wars is that, as discussed in chapter III, human rights violations that fall short of “enslavement and massacre” appear to play a prominent role nonetheless in the generation of significant amounts of death and misery through terrorism. To many commentators, the fact that the regimes recently deposed by the United States have had poor human rights records is nothing more than a rhetorically convenient coincidence that allows policy makers to drape imperialistic policies in the language of humanitarian intervention. But to others, the direct danger that illiberal regimes pose to their own citizens is inseparable from the indirect danger they pose to civilization as a whole

¹²⁸ Ibid., 89.

¹²⁹ Ibid.

¹³⁰ Christopher, 259, note 15.

through their role in constituting the threat of terrorism. Walzer himself indirectly hinted at this relationship in 1994 under the topic of “the politics of rescue”:

No doubt, the civilized world is capable of living with grossly uncivilized behavior... But behavior of that kind, unchallenged, tends to spread, to be imitated or reiterated. Pay the moral price of silence and callousness, and you will soon have to pay the political price of turmoil and lawlessness nearer to home.¹³¹

Walzer has conventional interstate threats in mind here, and he is reprimanding “silence and callousness” in the face of outright murder and enslavement. But “silence and callousness” at lesser abuses of human rights have had similar consequences. Indeed, it is impossible not to notice that Walzer’s words eerily foreshadow 9/11. Accordingly, there is a case to be made that foreign intervention is justifiable, practically as well as morally, in the presence of much lower-level human rights conditions than Walzer would allow.

C. CONCLUSION

Max Weber famously defined government as that authority which has a monopoly on the legitimate use of force within a territory. Here we encounter another parallel: The questions of whether a government is just and whether a war is just are, fundamentally, questions about the ethics of the use of violence for political purposes. Walzer writes that “war is most often a tyranny” and that the “peculiar horror of war” is that “it is a social practice in which force is used by and against men as loyal or constrained members of states and not as individuals who choose their own enterprises and activities.”¹³² Perhaps inadvertently, Walzer is documenting the fact that an unjust government and an unjust war both violate rights and that, ultimately, they violate the *same* rights. In light of this, the tremendous emphasis that Walzer and other modern just war thinkers place upon the distinction between violations of rights conducted within a country and violations of rights conducted across international borders appears to be out of proportion. Johnson criticizes this distinction when he writes that “justice as a component of the *jus ad bellum* requires that both aggression and defense be understood more broadly than in terms of

¹³¹ Walzer, *Arguing about War*, 74.

¹³² Walzer, *Just and Unjust Wars*, 29-30

military force, that intervention across political boundaries can sometimes—even if only rarely—be a just action, and that the legal existence of a regime does not guarantee its moral legitimacy.”¹³³ Once the distinction between external aggression via military means and internal aggression via governmental means dissolves, it seems quite natural that ethical standards for the violation of state sovereignty for the purposes of preventing terrorism and for the purposes of preventing human rights abuses should be one and the same.

To put this point in more explicit just war terms, both preventive wars aimed at terrorism and humanitarian interventions aimed at defending basic human rights have the same objective of changing—or at least influencing—the government of a state. The rationales differ: One has a basis in practical security concerns and the other has a basis in altruism. But these different reasons are little more than different answers to the same prudential *jus ad bellum* question of proportionality of means and ends—two different teleological justifications for war. As discussed in chapter II, the perception of a need to wage preventive war in self-defense will always be subjective, even if it is valid. Objections to the legitimization of preventive self-defense as a just cause, therefore, can be understood as reasonable apprehension at allowing such subjective reasoning to force its way into what we want to be an objective, deontological criterion for justice. In turn, it becomes clear that what the current debates about preventive war and humanitarian rescues are both struggling to identify is a *formal, deontological just cause criterion* for intervention across state boundaries. Identifying this criterion is troublesome because it exists well beyond the safety of the objective cases for self-defense that are possible in purely defensive or preemptive scenarios. In both prevention and humanitarian intervention, it appears that that formal criterion must be independent of subjective conceptions of self-defense and must instead lie in fact that a regime denies its citizens certain basic human rights.

Recent just war commentators have written of the ethical parallels between prevention and humanitarian intervention in their analysis of the war on terrorism, yet seem reluctant to draw any conclusions from it. Most prominently, Hehir, in a piece on

¹³³ Johnson, *Just War Tradition*, 328.

the consequences of the “Bush Doctrine” of preventive war, follows his discussion of the threat of mass-casualty terrorism with a discussion of the right of intervention, which he analyzes in the context of humanitarian causes.¹³⁴ This progression is natural, as Hehir recognizes that preventive wars and humanitarian rescues are both subcategories of the general category of intervention. Even his terminology reflects this, as he uses the apt term “strategic” intervention, as opposed to “humanitarian” intervention, for the kinds of military operations envisioned in the new US strategy. Hehir thus correctly identifies two different teleological rationales for what is essentially the same action. Yet, just as Hehir appears poised to unify the ethical dimensions of these two vexing international questions under one deontology, he abruptly insists that “one needs to distinguish humanitarian intervention... from what might be called strategic great-power intervention.” He concludes that “a case for [strategic] intervention is possible, but it involves a different set of criteria than humanitarian intervention.”¹³⁵ Hehir provides no reason why this must be so.

But other writers have traveled farther on Hehir’s logical path, more fully exploring the connection between human rights and prevention. This thesis will conclude by examining two proposals for the incorporation of human rights standards into an ethical boundary for preventive war.

¹³⁴ Hehir, “The New National Security Strategy,” 11-12.

¹³⁵ *Ibid.*, 12.

V. CONCLUSION

A. CONTRADICTIONS IN THE STATUS QUO

In making a case for the ethics of preventive war, this thesis has attacked the status quo on the basis of several contradictions: the contradiction within a *jus ad bellum* that seeks to minimize human suffering by demanding that war be a last resort, regardless of how much suffering could be avoided by an earlier resort to war; the contradiction within an international order that seeks security by protecting the sovereignty of states, regardless of the inherent security risks posed by certain types of states; and the contradiction within an international order that seeks to protect human rights by recognizing the sovereignty of all states, regardless of how some of those states abuse human rights within their borders. All of these contradictions are manifestations of a “deep fault line of liberal theory”¹³⁶ with state sovereignty, self-determination, and freedom from foreign intervention on the one side and human rights and democracy on the other.

1. “Two Liberalisms”

Gerry Simpson calls these two sides of the fault line the “two liberalisms” of the international order. The first of these is “Charter liberalism,” which seeks international peace by “emphasizing the sovereign equality of states”¹³⁷ and rejecting the idea that the internal qualities of states should have any legal significance. This version of liberalism resonates with the certain political and cultural outlooks that question the standing of the West to levy judgments upon the ethical systems and governmental practices of other countries. This view was prevalent during the early and mid-twentieth century, when it moderated the behavior of democratic states in the post-Versailles period and had an obvious impact on the UN Charter, from which Simpson derives his term. The essence of this belief was the domestic analogy: that “entities that were sovereign and independent were entitled to the same rights as other similarly situated states... States, like individuals, were entitled to full status regardless of constitutional structure or

¹³⁶ Smith, 283.

¹³⁷ Gerry Simpson, “Two Liberalisms,” *European Journal of International Law* 12, no. 3 (2001): 543.

political belief.”¹³⁸ This view remains prevalent and underlies the insistence on high standards for interventions advanced by Walzer and others.

Simpson’s second version of liberalism is the “anti-pluralist” type, which recognizes that the internal qualities of states have an impact on international order and should thus be reflected in international institutions. In its earliest form in the mid-1800’s, liberal anti-pluralism applied a vague standard of civilization to entities in the international community: Western powers treated each other as equals while they maintained substantially different relations with “uncivilized” states, which were often subjects of colonialism. This is undoubtedly a major reason for the resurgence of the term “empire” into the discourse about current US policy; Jedediah Purdy’s description of the newest form of anti-pluralist liberalism as “liberal imperialism,”¹³⁹ while tendentious, is nonetheless apt. But this post-Cold War iteration of judgmental liberalism is based on a growing consensus that human rights—not as markers of Western cultural superiority, but as universal values—should have a higher priority in international affairs than state sovereignty. This view is wary of the limitations of the domestic analogy and sees sovereignty as ultimately residing with individuals, not with states. The “strong form” of this anti-plural liberalism tends to “favor forms of exclusion” in international institutions based on human rights criteria and is “less constrained about recommending military action against illiberal or outlaw or recalcitrant states.”¹⁴⁰

These two divergent applications of liberal principles place the entire debate over human rights and state sovereignty—including the debate on preventive interventions against illiberal states—into historical perspective. Simpson observes that while human rights became more prominent in the international arena during and after the Cold War, “the practice of international organizations remained pluralistic. There was no serious attempt made to fix human rights obligations, routinely, to entry requirements into the international community...”¹⁴¹ In light of this, the linkage of human rights to the justice

¹³⁸ Ibid., 548.

¹³⁹ Jedediah Purdy, “Liberal Empire: Assessing the Arguments,” *Ethics and International Affairs* 17, no. 2 (2003): 35-47.

¹⁴⁰ Ibid., 559.

¹⁴¹ Ibid., 557.

of preventive war is merely one application of a resurging “strong” anti-pluralist liberalism that is manifesting itself in other ways.

2. A Debilitating Dichotomy

Paralleling the split in liberal thought documented by Simpson is a stubborn tendency in the West to dichotomize foreign policy motives by refusing to acknowledge any overlap between what is practical and what is idealistic. Healthy suspicion that humanitarian language might be a cover for venal self-interests has transmuted into an axiom that it *must* be. This is a plausible explanation for Hehir’s instinct that criteria for humanitarian intervention should be different from criteria for strategic intervention. It is easier to see in less thoughtful commentary on current US policy. Typical is Richard Falk, who alleges that the post-9/11 security strategy of the United States—a policy that, so far, has rid the world of two of the most oppressive regimes on earth—has actually “weakened” humanitarian law and resulted in the “eclipse of human rights”¹⁴² in the international arena. Apparently, Falk sees justice and humanitarianism only in wars that the United States has no practical reason to fight. For example, Falk found the Kosovo war “confusing”¹⁴³ because, one infers, the United States had no compelling self-interest in fighting it, giving Falk no foundation for his pre-fabricated opposition. Much of this kind of thinking is based on the double standards evident in past US policy, which occasionally did subordinate immediate human rights concerns to other interests.

But as this thesis has attempted to show, it is nearly impossible for a coherent strategy against terrorism and associated WMD threats to “eclipse” human rights in the same manner that US policy may have done so during the Cold War. This is because human rights are central to both the practical need and the ethical basis for a strategy of waging preventive war against illiberal states. Human rights are also the *sine qua non* of the political end-states that preventive war would attempt to bring about in target states. One need not be an altruist to reach these conclusions; not even the most Machiavellian foreign policy designer could ignore them. The double standards that have existed in US foreign policy, passionately recited by Falk and others, only reinforce the conclusion that

¹⁴² Richard Falk, *The Great Terror War* (New York: Olive Branch Press, 2003), 115-119, 147.

¹⁴³ *Ibid.*, xv. Falk supported the Kosovo war.

the international status quo before 9/11 contained inherent contradictions that forced choices between what was expedient and what was ethical. The fact that the US has adopted a new strategy that threatens the international status quo might signify to some critics that the double standards of the past have proved untenable, and that US policy is converging on the standard of human rights. As a result, reflexive opposition to US actions to protect itself risks becoming reflexive opposition to what could be a historic opportunity: a global human rights agenda backed by the resources of a superpower.

Other observers have recognized that the idealism that motivates humanitarian interventions and the pragmatism that motivates strategic interventions have become inseparable—that “ideals and self-interests are both generally considered necessary ingredients of the national interest.”¹⁴⁴

Something quite important has happened in American foreign policymaking with little notice of digestion of its meaning. Morality, values, ethics, universal principles—the whole panoply of ideals in international affairs that were once almost the exclusive domain of preachers and scholars—have taken root in the hearts, or at least the minds, of the American foreign policy community... and although some in [this community] may still be using moral language to cloak a traditional national security strategy agenda, one gets the sense that it is more than that.¹⁴⁵

Another writer observes that “idealism and realism have converged behind the policy of the United States in the Middle East.”¹⁴⁶ This new consistency between the ethical and practical dimensions of US foreign policy is driving reexaminations of the prohibition of preventive war. The key issue is how to legitimize preventive war in way that does not make prevention available as a pretext for aggression and thereby undermine the general international order.

¹⁴⁴ Leslie H. Gelb and Justine A. Rosenthal, “The Rise of Ethics in Foreign Policy: Reaching a Value Consensus,” *Foreign Affairs* 82, iss. 3 (May/Jun 2003): 7.

¹⁴⁵ *Ibid.*, 2.

¹⁴⁶ Tamara Cofman Wittes, “The Promise of Arab Liberalism,” *Policy Review* 125, no. 63 (Jun/Jul 2004): 63.

B. RESOLUTIONS IN THE FUTURE: TWO PROPOSALS FOR LIMITING PREVENTIVE WAR

1. Prevention Bounded by International Law: A “Cosmopolitan Institutional” Approach

The boldest entry is Allen Buchanan and Robert E. Keohane’s “cosmopolitan institutional proposal.” It “begins with the assumption that it can be morally permissible to use force to stop *presently occurring* massive violations of human rights,” from which follows a “prima facie case for the moral permissibility of using force to *prevent* massive violations of human rights.”¹⁴⁷ Buchanan and Keohane do not rely upon a link between regimes that violate human rights and the existence of mass-casualty terrorism as the justification for preventive war on humanitarian grounds. Instead, they rely upon the fact that a terrorist attack is itself a violation of human rights. Preventing the attack, therefore, is a human rights objective.

In Buchanan and Keohane’s proposal, the power to authorize preventive wars would reside within an international body, either a veto-less UNSC or some other institution. Interestingly, the favored alternative to the UNSC is something like a league of democracies—a group of states whose “moral reliability”¹⁴⁸ qualifies them to render collective judgments on the justice of preventive war. This coalition would have entrance requirements consisting mainly of human rights standards. The authors do not specify those standards, but stipulate that they exclude “unambiguous violators of human rights.”¹⁴⁹

Whatever the form of the institution or its requirements for membership might be, Buchanan and Keohane endow it with powers to discourage both disingenuous calls for war under preventive rationales and parochial opposition to preventive wars that might be necessary. In an *ex ante* process, states proposing prevention would make a case for war and the body would vote to authorize it. In an *ex post* process, investigators would

¹⁴⁷ Buchanan and Keohane, 4-5.

¹⁴⁸ *Ibid.*, 19.

¹⁴⁹ *Ibid.*, 18.

determine if the case for preventive war proved to be valid. If so, the body would penalize states who opposed the war; if not, the body would penalize states that pushed for the war.

Although they do not say so explicitly, what Buchanan and Keohane attempt to do with this proposal is provide a formal criterion for the legitimization of a preventive war. The formal criterion they offer is multilateral collective agreement that the prudential case for a war is reasonable. Buchanan and Keohane do not advertise this proposal as an optimum solution, and present it instead as a useful and feasible improvement to the status quo. Nonetheless, their recommendation has three significant drawbacks.

First, as the authors are well aware, the judgment of a group of states—even liberal democracies—would not necessarily be any less subjective than the judgment of one of them. As Walzer wrote on the topic of UN-justified interventions, “The politics if the UN is no more edifying than the politics of many of its members, and the decision to intervene, whether it is local or global, whether it is made individually or collectively, is always a political decision. Its motives will be mixed; the collective will to act is sure to be as impure as the individual will to act (and is likely to be much slower).”¹⁵⁰ Buchanan and Keohane do not claim that their processes would remove subjectivity from the decision to wage preventive war, but merely that they would “take the sting out of the fact that there is no unique, non-arbitrary threshold of probability of harm needed to justify prevention.”¹⁵¹ This leaves much to be desired, as objectivity is an important characteristic of any legal regime to regulate prevention.

Second, there are problems with Buchanan and Keohane’s insistence on sanctions against a state that advocates a preventive war that fails to achieve the human rights benefits—again, prevention of a terrorist or WMD attack falls into this category—that its advocates had claimed it would. First of all, any national leader, especially in a democracy, who expends blood and treasure on an unprovoked war that turns out to be unnecessary would be subject to hefty “sanctions” of the domestic political type. Buchanan and Keohane cite such democratic constraints as a reason to favor a coalition

¹⁵⁰ Walzer, *Just and Unjust Wars*, 3rd ed., xiv.

¹⁵¹ *Ibid.*, 10.

of democracies as the judges of preventive war,¹⁵² but it is not clear why these electoral pressures are insufficient by themselves to ensure good faith behavior by leaders of democracies on questions of preventive war.

But the more important aspect of the authors' provision for additional, artificial sanctions against erring leaders is their failure to account for what late medieval just war theorists called "invincible ignorance,"¹⁵³ which is reflected in the modern distinction between justifiable and excusable homicide: an moral agent who makes a good faith effort to ascertain the justice of his cause cannot be sanctioned merely because his cause is—or proves to be—objectively unjust. To do so would be to punish people not because they make unethical decisions, but because they are not omniscient. Indeed, Buchanan and Keohane appear to be basing much of their proposal to combat dishonesty in preventive justifications for war when the real problem is uncertainty. The limited ability of intelligence to positively ascertain the extent and timing of terrorist and rogue state WMD threats is precisely the reason why a purely preemptive approach to those problems is untenable and why a preventive approach may be the only viable defense.

To Grotius, uncertainty of the justice of war argues in favor of peace. But dispassionate assessments of the costs of regime change versus the risks of inaction in today's environment suggest that erring on the side of peace is not always the more responsible choice. Given these conditions, it would be sophistry to sanction decision-makers for the epistemological limitations on their knowledge of threats: If a preventive war could be justified on the demonstrable certainty of a threat, it would fall under the regime of preemption rather than prevention. The decision to wage a preventive war invariably occurs under the conditions of uncertainty, which are particularly severe in the threats of terrorism and WMD. Dealing with this uncertainty involves making good bets—and sometimes good bets miss. Buchanan and Keohane's proposal to raise the stakes on leaders tasked with protecting the lives of their citizens is unhelpful in this regard.

¹⁵² Ibid., 19.

¹⁵³ Johnson, *Ideology, Reason, and the Limitation of War*, 188-195.

Finally, Buchanan and Keohane's approach to limiting preventive war is ethically evasive. The salient ethical question in both preventive wars and humanitarian interventions is to find an objective, deontological standard that, when combined with subjective value judgments on the prudence of such a war, can support a determination as to whether the violation of another state's sovereignty is just. By recycling prudential criteria of proportionality and chance of success through institutional machinery in order to synthesize an objective legal criterion for preventive war, Buchanan and Keohane avoid the central ethical question, which is the limits of the *right*—not the usefulness—of the target state's sovereignty. In place of a rights-based answer to this question, the authors offer a kind of collectivized utilitarianism. Granted, human rights values might be inputs of this utilitarian equation. But this does not alter the fact that the cosmopolitan institutional approach fails to provide a deontological answer to the question of the limits of rights to sovereignty.

As a result, it is unclear what Buchanan and Keohane would offer as ethical guidance to individual states on deciding how to vote on a proposed preventive war or whether to participate in it. If the answer is pure utilitarianism in terms of costs versus human rights and security benefits, then—as Kant sardonically suggested—the cosmopolitan institutional approach would indeed banish the concept of right from an important part of international relations, replacing it with the dubious legitimacy of a majority vote. But if the behavior of individual states on this matter is to have any basis in right, then those states must have a formal, deontological criterion—independent of utilitarian calculations—for deciding whether or not a preventive war is just.

It is curious the Buchanan and Keohane find observance of human rights to be of central importance in qualifying states to authorize preventive war, yet stop short of concluding that observance of human rights is what qualifies states to be states in the first place. The following proposal proceeds down that latter path.

2. Prevention Bounded by Ethics: A New *Jus ad Bellum*

As opposed to creating an institutional process as a source of formal legitimacy for preventive war, this author proposes that the very existence of an illiberal regime

satisfies a formal criterion for preventive war—and for that matter, all other infringements on that state’s sovereignty. The formal criterion is that of just cause. Here, just cause does not arise from a subjective perception of a need for self-defense nor a collective judgment on the merits of a case for preventive war as in the cosmopolitan institutional approach; those strategic and utilitarian calculations are left to state leaders. Instead, this formal criterion concerns itself solely with the objectively manageable question of whether a state fails to meet certain human rights standards. The illegitimacy of a state would be the deontological basis for intervention, and, when combined with other formal and prudential criteria, would make a preventive war “just” in the classical sense of the word. Thus, while Buchanan and Keohane employ human rights standards identify the judges of preventive war, this approach employs human rights standards to identify the defendants also. With that, a new *jus ad bellum* for preventive war *and for humanitarian interventions* might go as follows:

a. Formal Criteria

(1) Just Cause. As stated above, the fact that a regime fails to meet certain universal standards of human rights would be a just cause for a war of regime change against that state. Needless to say, this would be a significant change in the international order. But it is little more than the logical application of the principles that (a) the international system of sovereign states is a formal means to the practical end of protecting individual rights worldwide and (b) a government that is inimical to the end of human rights has no right to exist. The legitimization of preventive war against illiberal states is an ethical consequence of the fact that such a state “does not have the same legitimacy as a properly constituted national or international regime.”¹⁵⁴ The new *jus ad bellum*, therefore, does not extend a right to intervene so much as it withdraws a right to be protected from attack. This inversion of the right of war from a positive to a negative sense, if fully developed, promises new clarity in just war thinking.

It must be reiterated that self-defense is specifically proscribed as a just cause for intervention, whether strategic (preventive) or humanitarian. Security benefits that may be won by the removal of an oppressive regime are merely additional inputs to

¹⁵⁴ Royal, 9-10.

the teleological rationale for war.¹⁵⁵ The deontological right to intervene is independent of our security concerns.

(2) Right Intention. Since the cause for intervention is human rights violations, right intention would demand that the war and occupation be aimed at the improvement of those conditions. In other words, the occupiers would have to leave behind a more liberal regime than the one they removed from power. Traditionally, right intention has ruled out objectives for war that are incidental to the cause; but in the case of a preventive war against terrorism and WMD threats, it would not be unreasonable to allow the intervening state to confront terrorist elements directly and eliminate WMD capabilities, at least for the period during which occupation is necessary. These threats could be construed as manifestations of the prior human rights conditions, meaning that confronting them would be germane, at least, to the cause for war.

(3) Proper Authority and Open Declaration. The criteria of proper authority and open declaration would remain largely intact, as the prosecution of war would remain in the purview of states. However, the explicit identification of universal, enforceable standards of human rights by some international body might provide the normative basis for a migration of real authority to declare wars of intervention to the international level. This resonates with Buchanan and Keohane's proposal, but this counterproposal differs in that it considers the establishment of an explicit ethics of preventive war to be prior to the institutionalization of those ethics.

(4) Last Resort. The intellectually flimsy criterion of last resort would be assimilated into the proportionality criterion, where it logically belongs. This would resolve the contradiction between last resort and proportionality and rectify the current bias of the *jus ad bellum* toward measures other than war that may, in the long run, result in more net harm than war itself.

b. Prudential Criteria

(1) Proportionality. The proportionality criterion would be crucial in limiting the number of preventive wars that could be justly pursued by liberal states on

¹⁵⁵ The rejection of self-defense as a just cause is consistent with St. Augustine's aforementioned trepidation as well as more recent attacks on its ethical status and implications: See, for example, David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2003) and the symposium on that book in *Ethics and International Affairs* 18, no. 1 (2004): 63-98.

strategic and humanitarian grounds. The criterion would compare not only the costs of such wars to their benefits, but also the relative costs and benefits of alternatives, thereby subsuming the last resort criterion. Against war, proportionality would count the availability of alternative means if compulsion and prospects of spontaneous, indigenous improvements in human rights conditions in target states.

(2) Chance of Success. The chance of success criterion further inhibits the proliferation of preventive wars of liberation, insisting that a war of regime change have reasonable prospects of bringing about the replacement the existing government with a better one. Substantial domestic opposition to the regime and a propensity for the establishment of a liberal government would likely be requisites. This is where Walzer and Mill's concern with the worthiness of oppressed peoples to be free properly belongs.

c. *Current Policy in Terms of a New Jus ad Bellum*

This framework appears to be useful in capturing the main disagreements over the recent war in Iraq. According to these *jus ad bellum* criteria, the war of regime change against Saddam was justifiable in a formal, deontological sense. (And if international law had been consistent with these formal criteria, the war would have been legal.) There has been a questioning of the Bush administration's intentions in Iraq—as Grotius realized, such accusations of impure intentions are unanswerable—but few of even the most vocal critics of the war dare to argue that Saddam had a “right” to rule the country. The prudence of the war in Iraq is the crux of the debate: The most substantial clashes break out over the question of whether the benefits of removing Saddam were worth the costs. As the new *jus ad bellum* makes self-defense a matter of teleological rather than deontological significance, the fact that Iraq turned out not to have a stockpile of WMD—given that the administration honestly believed that there was a significant probability that they were present—might be a strike against the strategic competence of the Bush administration, but it has nothing to do with the right of the United States and its allies to remove Saddam. Nonetheless, this and other evidence that the war in Iraq is netting more harm than good allows opponents to legitimately describe it as “unjust,” as the *jus ad bellum* continues to demand both deontological and teleological validity of a just war.

This revised *jus ad bellum* also seems to provide plausible advice and reasonable controls on other imaginable preventive wars. For the sake of completeness, it must be said that strategic interventions against other liberal democracies, in addition to being an empty set teleologically, are prohibited deontologically. All of the interventions that the United States might realistically be inclined to consider, from the “Axis of Evil” to a broader list of problem states, are against illiberal regimes—and as chapter III of this thesis argues, that is no coincidence. Preventive wars intended to change the regimes of these states would therefore have just causes. But many of these wars would fail to pass the prudential tests, as either the costs of regime change would outweigh the resulting benefits, or other avenues, including domestic trends, would offer greater chances of success at less cost. In these cases, the new *jus ad bellum* would constrain any US urge to forcibly change regimes on the basis that doing so would be unwise, and thus unjust. But the new *jus ad bellum* would *not* constrain US policy on the grounds that these regimes have a right to sovereignty. If the dangers posed by states such as Iran and North Korea were to become more severe in the assessment of US policy makers, interventions against them might very well meet the prudential criteria of justice. Those who disagree would be placed in the very difficult position of arguing that it the world is ethically bound to protect regimes that oppress their own people and pose severe dangers—even if indirectly—to the outside world.

One final benefit of this new *jus ad bellum* for intervention is that it could bring about a new urgency to codify international human rights standards. As previously discussed, current documents are woefully inadequate for this role because they are philosophically unsound and tend to promote mere social desiderata to the status of rights. Real human rights might very well be those that we are willing to integrate into a standard for the legitimization of war.

C. NEW REASONS TO ANSWER AN OLD QUESTION

The debate over the justice of preventive war is not an esoteric, isolated discussion that is relevant today only because of the peculiar circumstances of the United States possessing the capability to wage such wars and international terrorism providing

an urgent reason for doing so. Rather, the current debate is only the latest manifestation of a more fundamental question that has haunted international affairs since the beginnings of the current state-based system. Arguments over membership requirements of international bodies, rules for humanitarian interventions, and the ethics of preventive “strategic” interventions all arise from the tension between state sovereignty as a means and human freedom as an end. Taking up the last form of the question, this thesis has attempted to resolve some of that tension in the language of just war doctrine. But similar answers have already been derived from the other forms of the question, and many of those answers are oriented toward the conclusion that the internal political characteristics of states are ethically meaningful and that international institutions and the laws of war cannot ignore them.

Indeed, the idea of linking human rights with preventive action appeared as early as 1946 during the initial stages of the drafting of the UDHR, when Henri Laugier, a UN official, reminded delegates that if a mechanism for human rights enforcement

had existed a few years ago, if it had been powerful and if the universal support of public opinion had given it authority, international action would have been mobilized immediately against the first authors and supporters of fascism and Nazism. The human community would have been able to stop those who started the war at the moment they were still weak and the world catastrophe would have been avoided.¹⁵⁶

The UN failed to make human rights an enforceable standard of international behavior. But today, there is a renewed imperative to do so as new potential forms of “catastrophe”—albeit ones that owe much to the totalitarian movements of the 1930’s and 40’s—are at hand. Morally, we require a new conception of just war to enable us to confront these dangers without betraying the ethics on the use of force that distinguishes us from our enemies. And practically, we require a new conception of just war upon which to defend our actions and win the support of critics, foreign and domestic alike, whose diverging views on the ethics of violence are becoming increasingly ominous for the future of Western Civilization.

¹⁵⁶ Meeting of the Nuclear (preparatory) Committee of the UN Economic and Social Council, April 1946, as cited in Morsink, 14.

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